

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

MONIQUE DA SILVA MOORE, et al.,

Plaintiffs,

v.

PUBLICIS GROUPE and MSL GROUP,

Defendants.

11 Civ. 1279 (ALC)

Conference

New York, N.Y.  
February 8, 2012  
3:00 p.m.

Before:

HON. ANDREW J. PECK

Magistrate Judge

APPEARANCES

SANFORD WITTELS & HEISLER LLP  
Attorneys for Plaintiffs  
BY: JANETTE L. WIPPER (tel.)  
DEEPIKA BAINS  
SIHAM NURHUSSEIN

JACKSON LEWIS LLP  
Attorneys for Defendants  
BY: JEFFREY W. BRECHER  
BRETT M. ANDERS

ALSO PRESENT:

PAUL J. NEALE  
DAVID BASKIN

1 (Case called)

2 THE COURT: We have the major issue of e-discovery  
3 protocols and the like. Also, I got this morning a letter from  
4 the plaintiffs asking for permission to make a motion for  
5 sanctions. I guess we will deal with that first.

6 However, I suggest, since lead counsel seems to be out  
7 of state, perhaps, that you all talk to the New York office a  
8 lot more, because we generally don't do discovery motions as  
9 motions. If all you're asking for is money and you want to  
10 make a motion for sanctions and I'll get to it when I get to  
11 it, which may well be when discovery otherwise is over, feel  
12 free.

13 In addition, in general it is Second Circuit law that  
14 I can't stop you from making any motion you want at any point  
15 after a pre-motion conference. I certainly am not giving  
16 plaintiffs in this case, or either side in this case, although  
17 it was plaintiffs who requested it, the ability to file motions  
18 in the future without pre-motion conferences. I just don't see  
19 how that is consistent with our local practice. Maybe somebody  
20 on the plaintiffs' side could try to explain that to me.

21 MS. BAINS: Your Honor, we are OK with that ruling,  
22 but we requested that because of the numerous discovery  
23 violations that have been happening --

24 THE COURT: My question is, why are you trying to  
25 practice law the San Francisco way instead of the New York way?

1 MS. BAINS: We are not asking to do that. We respect  
2 the Court's decision.

3 THE COURT: That's what the letter says. You want to  
4 be relieved of all pre-motion conferences, isn't that what your  
5 letter asks for?

6 MS. BAINS: Given the circumstances of this case, yes.

7 THE COURT: Frankly, given the circumstances in the  
8 case, all the more reason why there should be pre-motion  
9 conferences. Otherwise, it will be five years before discovery  
10 is concluded, because each of you doesn't like what the other  
11 is doing. If we do it the formal motion way for everything you  
12 want to do, there will be at least a month delay while a motion  
13 is filed and responded to. So, I'm having a little bit of  
14 trouble seriously understanding what it is that you think  
15 you're doing.

16 MS. WIPPER: This is Jeanette Wipper. Your Honor, if  
17 I may address the Court. We are not asking to not comply with  
18 your individual practices. The issue that we are dealing with  
19 and we are trying to address --

20 THE COURT: Ms. Wipper, with all due respect, excuse  
21 me. Let me read what you wrote me, page 8 of your letter, last  
22 sentence on the page "Plaintiffs further respectfully request  
23 to be relieved of the obligation to file pre-motion letters and  
24 appear for pre-motion conferences before filing future motions  
25 to compel in this matter." That is directly contrary to

1 Southern District practice.

2 MS. WIPPER: Your Honor, if I may address that. The  
3 reason we raised the issue in the letter is because we are  
4 currently fighting with defense counsel about discovery that  
5 was requested on May 13, 2011, and was compelled by Judge  
6 Sullivan on September 14th of 2012 and was compelled by your  
7 Honor on January 4th of 2012.

8 THE COURT: Why is it that adding a month delay, if  
9 not more, to every discovery motion to compel gains anything?  
10 Plus, of course, as I explained to all of you at our last  
11 conference, whatever may have occurred before I got involved in  
12 the case, there is not much I can do about that. As to  
13 noncompliance going forward, I intend to deal with that and  
14 deal with it strictly.

15 MS. WIPPER: Thank you, your Honor. If you believe  
16 that it would be more efficient to have more frequent  
17 conferences, obviously we would like that to happen.

18 THE COURT: Ms. Wipper, have you read my rules?

19 MS. WIPPER: Yes, your Honor.

20 THE COURT: What does it say about the frequency of  
21 conferences? I'm going to embarrass you here, because I really  
22 don't think you did read them. What does my rule say?

23 MS. WIPPER: I understand you have a rocket docket,  
24 and I also understand that if you don't move to compel early  
25 enough, you may not allow the party to file a motion to compel.

1 THE COURT: What does my rule say about conferences?

2 MS. WIPPER: That you are available for conferences  
3 and that pre-motion conferences are required.

4 THE COURT: And that any time you have a discovery  
5 dispute, even if the prescheduled conference is a month away, a  
6 week away, a day away, if you've got an emergency, meaning it  
7 should be decided sooner rather than later, you contact the  
8 Court and I get you in.

9 I'm not happy, first of all, with the way both sides  
10 are handling this case, which frankly is only adding more costs  
11 to your respective clients or, if plaintiffs are on a  
12 contingency, more work for which you someday hope you will get  
13 paid by somebody.

14 In any event, you are not relieved from pre-motion  
15 conference requirements. As to whether you want to make  
16 motions after that at any point in discovery matters, even  
17 though in almost all cases I will have ruled from the bench, go  
18 right ahead. The result is not going to be any different.

19 With respect to this on the merits, let me hear from  
20 defendant.

21 MR. BRECHER: Good afternoon, your Honor. Jeffrey  
22 Brecher on behalf of MSL Group. We received this letter last  
23 night at around 8 o'clock via email, so we haven't had a full  
24 opportunity to review everything in it. But let me address  
25 what is raised in the letter.

1           The first issue is complaints. At the conference that  
2 was held on January 4th, you ordered the defendant to produce  
3 complaints made by females alleging gender discrimination and  
4 sexual harassment for the period of February 2008 to February  
5 24th of 2011. They have appealed that ruling to District Judge  
6 Carter. On January 25th we produced documents falling within  
7 the scope of the Court's order.

8           THE COURT: Is that a complete production other than  
9 what may be in the ESI? They say it's not.

10          MR. BRECHER: Right. What we did is when they said it  
11 is not, we sent them an email saying that is all we are aware  
12 of and we conducted a diligent search for any complaints, if  
13 you have any other information that might lead us to something  
14 else, feel free, give it to us. We didn't hear back from them  
15 for a week. On Monday they gave us some additional names.

16          On Tuesday, yesterday, we did some further  
17 investigation to see if there was anything relating to those  
18 individuals mentioned. At this point we have not identified  
19 any other additional complaints that fall within the scope of  
20 the Court's order.

21          THE COURT: Tell me your method of search and who you  
22 spoke to, how you went about it, what files were searched.

23          MR. BRECHER: With respect to the names that they  
24 mentioned, we could not find any additional complaints. We  
25 have identified one other person unrelated to anyone they

1 mentioned that we believe will probably be responsive and will  
2 produce this week.

3           What did we do? We spoke with the highest levels of  
4 the company with respect to the human resources department.  
5 That would have included the senior vice president of human  
6 resources for North America, the director of human resources,  
7 and the chief town officer. We also had the local HR offices  
8 check to see if there were any other complaints that we were  
9 not aware of.

10           In addition to that, Judge, for the people that they  
11 mentioned specifically, we inquired of the active employees who  
12 we are able to contact, are you aware of anything, without  
13 divulging the substance of our communications that are  
14 privileged. We have not identified any other complaints, other  
15 than the one that I mentioned, that are responsive and within  
16 the scope of the Court's order.

17           If they have something more specific, if they have the  
18 name of the person who complained, the date that it happened,  
19 I'm happy to go look further. But at this point, Judge, we  
20 feel we have complied with the order. I would say we don't  
21 appreciate the last-minute motion for sanctions the night  
22 before the court order. It's not professional, Judge.

23           THE COURT: Let me hear first from -- who am I hearing  
24 from?

25           MS. NURHUSSEIN: Thank you, your Honor.

1 THE COURT: You're Ms.?

2 MS. NURHUSSEIN: Siham Nurhusein for plaintiffs.

3 THE COURT: It will take me a while to figure out who  
4 is who. Go ahead.

5 MS. NURHUSSEIN: Understandable, your Honor. If I  
6 could respond to a couple of points Mr. Brecher mention. First  
7 of all, this is the first we have heard as to the sort of  
8 search he has conducted.

9 THE COURT: I suspect that is because you and they  
10 don't talk to each other or don't talk to each other very well.

11 MS. NURHUSSEIN: Actually, your Honor, he mentioned  
12 that we raised this issue for the first time in terms of the  
13 types of complaints we were aware of on Monday. We actually  
14 sent an email on January 30th, so over a week ago, raising all  
15 these concerns, identifying at least one --

16 THE COURT: Let's get to the merits. You each think  
17 you sandbagged each other. You may well be on your way to a  
18 special master if I lose too much patience with you. But let's  
19 get to the merits.

20 On the employment discrimination complaints, what is  
21 it that you want them to do that they haven't done or what is  
22 it you think is missing other than you think the company is  
23 rife with discrimination and therefore there should be more?  
24 That I can't rule on.

25 MS. NURHUSSEIN: Your Honor, I think we do need



confirmation, which I think Mr. Brecher has just confirmed, but I'd like him to be clear about that, that he has inquired and searched the files of all individuals that MSL itself identified as having responsibility for investigating and responding to complaints of discrimination. That's a reasonable request because in response to --

THE COURT: He doesn't necessarily have to search those files if he talks to those people and they say there isn't anything.

MS. NURHUSSEIN: Yes.

THE COURT: That's what I have heard him to be saying.

MS. NURHUSSEIN: I just want to confirm that that conversation occurred with every individual who MSL identified as having responsibility for responding to and/or investigating complaints.

MR. BRECHER: Two comments, I guess, Judge. The first is, obviously, the Court has discretion to order us to disclose our efforts. But to the extent that we are constantly being asked for each response to identify every step that we took to respond, that is not how typically we respond to discovery. I'm not obligated to share my work product as to every step I took and what decisions I made.

THE COURT: No, but I'm sure you don't want a 30(b)(6) deposition on useless subjects, because it's just going to be more expensive.

1 MR. BRECHER: We are going to get that anyway.

2 THE COURT: That is probably true in this case.

3 MR. BRECHER: We did, as I said, speak with the  
4 highest levels of HR in our discussions with our client, again  
5 without revealing any privileged communications. We believe  
6 that that would be sufficient to identify the complaints.  
7 However, we went a step further. I'm not going to represent to  
8 the Court I personally spoke with each person, I can't make  
9 that representation, but we have inquired with the local HR  
10 people who are still active -- I can't speak to former  
11 people -- if there are any other complaints, and we have not  
12 identified any other than the one that I mentioned earlier.

13 Based on that, instead of calling us, discussing it on  
14 Monday, they say, here's what I want you to do, tell us one,  
15 two, three, four, five, everything you did, and on Tuesday, the  
16 next day, they file a motion for sanctions at 8 o'clock at  
17 night. Judge, this is just an example of what we have been  
18 dealing with.

19 THE COURT: Ms. Nurhussein?

20 MS. NURHUSSEIN: One other issue I'd like to raise,  
21 your Honor. MSL, our understanding is that they are limiting  
22 their search of the shared drives and have only conducted the  
23 search as to certain HR drives.

24 THE COURT: If we are talking about ESI, that's an  
25 entirely different issue. This is paper.

MS. NURHUSSEIN: Your Honor, I think the issue is that MSL, as we will get into more detail later on --

THE COURT: Then save it for later on.

MS. NURHUSSEIN: OK.

THE COURT: So there are no sanctions as to the discrimination complaint issue. Payroll?

MS. WIPPER: Your Honor, if I can address the Court, before you move forward to payroll, on the issue of the complaint?

THE COURT: Excuse me. Are we doing tag team?

MS. WIPPER: No. Sorry, your Honor.

THE COURT: You can show up in person next time or you can argue the whole thing yourself on the phone with your associate sitting here. You can't do both.

MS. NURHUSSEIN: Your Honor, may I make one more point? We also have concerns, because we are aware of specific complaints against --

THE COURT: Counsel, how do I rule? Tell me what ruling you'd like. That I should sanction them because you think there are others or even know of others that they haven't produced? If you want to do 30(b)(6) depositions, it's a waste of time and money. At this point on this record I'm not sure what you want me to do.

Yes, I understand there is some circularity to all of this, you give them names and then they perhaps find documents.

1 But since we are talking about the paper and knowledge  
2 information of the HR department and the like at this point and  
3 there is going to be a much more complete search of ESI if we  
4 ever get to that issue today, I'm not quite sure what you want  
5 me to do.

6 MS. NURHUSSEIN: Your Honor, the concern --

7 THE COURT: I understand your concern. You're telling  
8 me they didn't produce everything. Mr. Brecher is telling me  
9 they did produce whatever they found, and the description he  
10 gave of what they did sounds reasonable. How do I rule for  
11 you?

12 MS. NURHUSSEIN: Your Honor, I think we also need  
13 confirmation that at a minimum MSL has conducted a search for  
14 complaints relating to the specific individuals that we have  
15 identified even though we have much more limited access to  
16 information and access to MSL employees.

17 THE COURT: Write them a letter, and they will respond  
18 to it.

19 MS. NURHUSSEIN: Actually, they have not been  
20 responding to the majority of our correspondence, which is  
21 another reason why --

22 THE COURT: New rules. For example, one, no letter to  
23 the Court closer to the conference than two days before. I  
24 didn't see this letter until 9 o'clock this morning. It came  
25 in at 8 o'clock last night. There are limits. That's number

1 one.

2 Number two, modification of the Rifkind rule, Rifkind  
3 being the senior partner of my old firm Paul Weiss Rifkind.  
4 The modification is all letters will be responded to within a  
5 week, sooner if at all possible, certainly no later than a  
6 week.

7 With all due respect, I don't know how it got here.  
8 Maybe it's because when you were in front of Judge Sullivan  
9 originally, the case was not given as much judicial supervision  
10 as it needed, but you're out of control here. You all had  
11 better cooperate with each other. If you don't, I am going to  
12 withdraw Ms. Wipper's telephone privileges; and if you want a  
13 regular 9 o'clock every Friday conference or whatever, we'll do  
14 it, until I lose even more patience with you, and then you'll  
15 get a special master, and whoever loses each issue in front of  
16 the special master will pay the special master's fees of  
17 several hundred to a thousand dollars an hour.

18 I've seen many a big case in this court go a lot more  
19 smoothly than this. As I say, I cannot speak to what happened  
20 before I inherited the case, but I expect cooperation. Stop  
21 the whining and stop the sandbagging. This goes for both  
22 sides. Get along. You're going to run out of your judicial  
23 time. And I don't just mean the discovery period will end.  
24 You're not my only case, you're not my only big case. At some  
25 point I'm going to say every conference is two hours with you

1 guys and you don't get any more conferences because you have  
2 used up your allotment of judicial time.

3 Now let's move on to the payroll. Mr. Brecher.

4 MR. BRECHER: Thank you, your Honor. If I might,  
5 could you add one more little rule to your list there? Just  
6 that all correspondence be sent by the close of business, not  
7 11 o'clock at night?

8 THE COURT: It doesn't matter, but it won't count  
9 until the next business day. Obviously, if it is coming to me  
10 by two days before, I don't mean anything after when I go home  
11 at 6 o'clock at night. I usually stay later, but we will count  
12 that as your cutoff.

13 MR. BRECHER: Thank you, your Honor.

14 THE COURT: For a Wednesday conference, I would expect  
15 letters no later than 6 o'clock on Monday, etc. If it's a  
16 Monday conference, that means Thursday. Business days.

17 MR. BRECHER: Thank you, your Honor.

18 With respect to the payroll, let me go back to the  
19 first request for production of documents which asked for a  
20 database or computerized information regarding salary. What we  
21 did, Judge, in the case is we gave them data regarding the  
22 entire class, every male, every female. That means every date  
23 of hire, every termination, every salary, every promotion,  
24 every bonus. They have all of that information, which would  
25 enable them to compare the salaries of one person against

1 another. They have all of that information.

2 What they then requested was, well, we want the  
3 information on the W-2, box 5 on the W-2. I'm not quite  
4 certain why that information is more relevant than the annual  
5 salary of a person, since it would seem logical you would  
6 compare two salaries as opposed to what someone earned at a  
7 particular point.

8 THE COURT: However.

9 MR. BRECHER: However, what we told the plaintiffs was  
10 the W-2 is not an electronic document. The W-2's are PDF's,  
11 but it's not a number you can extract from the PDF.

12 THE COURT: Why can't you just, and maybe it's because  
13 you're only doing this for a subset of employees --

14 MR. BRECHER: Right.

15 THE COURT: -- give them the disks with the W-2's on  
16 it?

17 MR. BRECHER: Because we have to pull each person's  
18 W-2.

19 THE COURT: Why don't you let them do that?

20 MS. NURHUSSEIN: It has all the other financial  
21 information and salary information of other people. Judge, you  
22 said if there is an electronic way to get that at that time,  
23 provide it to them. What we did was we consulted with the  
24 client, is there a way where we can get the gross earnings per  
25 year, which is what they want. If someone worked six months,

1 they want to know what someone made for 6 months regardless of  
2 what their salary was for the year. They already had that, but  
3 they want the subset. Is there a way to do that? We believe  
4 there is. So we extracted that data and we provided it to  
5 them.

6 The first I'm hearing is in a motion for sanctions  
7 that the information is erroneous, it's got errors in it. They  
8 never said to us, oh, there is a problem with the data or we  
9 need to talk about this further. I'm not sure what the problem  
10 is with the data, but we have given them now people's salary,  
11 they know exactly what everybody made, and we have given them  
12 what they earned. I'm not sure what the problem is.

13 THE COURT: At this point are the CD's normal CD's  
14 that can be read anywhere?

15 MR. BRECHER: They are CD's that I believe have PDF's  
16 of each W-2, yes.

17 THE COURT: Do you really want these CD's?

18 MS. BAINS: Yes, your Honor.

19 THE COURT: Fine. Here is what you are going to do.  
20 You are going to read them at defense counsel's office. No  
21 notes can be taken. You will print out what you want to print  
22 out page by page only for who you are entitled to the  
23 information on. You will then show those copies to Mr. Brecher  
24 or his colleagues. Then you will get the copies, assuming they  
25 are for the right people. This is all so much ado about



1 nothing.

2 MS. BAINS: Your Honor, at the last conference defense  
3 counsel also claimed that they have given us all pay  
4 information, which we then received actual pay information that  
5 was in the people's database all along.

6 THE COURT: One issue at a time. Do you want the  
7 W-2's or not?

8 MS. BAINS: We do, because we didn't get full and  
9 complete payroll.

10 THE COURT: Stop. Please. I take judicial notice of  
11 the fact that you don't like the defendants. Stop whining and  
12 let's talk substance. I don't care how we got here and I'm not  
13 giving anyone money today. In the future not only will there  
14 be sanctions for whoever wins or loses these discovery  
15 disputes, -- and so far you're one for two, I think -- there  
16 will be sanctions payable to the clerk of court for wasting my  
17 time because you can't cooperate.

18 You're getting the W-2's in the way I have just  
19 ordered. With that information, is anything else from this  
20 thing relevant as opposed to what they gave you in the past or  
21 how they screwed you in the past or anything else?

22 MS. BAINS: No, your Honor, that's it.

23 THE COURT: Good. Then we are done with this. Is  
24 there anything else in this nine-page letter that requires the  
25 Court to rule? I'm denying sanctions.

1 MS. NURHUSSEIN: Your Honor, there is one issue I  
2 would bring up just briefly that we mentioned in passing in the  
3 letter, which is the issue of the deposition schedule. I know  
4 your Honor during our first conference instructed us to work to  
5 come up with a schedule and to indicate priority.

6 THE COURT: Are you in any way able to do that before  
7 you get the ESI, or is this an issue that we will probably take  
8 up at our next six conferences?

9 MS. NURHUSSEIN: All I'm asking your Honor is -- so  
10 far they have had an opportunity to take virtually all the  
11 plaintiff depositions, six of the seven.

12 THE COURT: Stop. Tell me when you want depositions  
13 to start? Do you want them to start next week? I'm order them  
14 to start next week.

15 MS. NURHUSSEIN: Your Honor, we submitted a proposed  
16 deposition schedule with the first deposition beginning I  
17 believe on March 22nd. What we want is MSL to confirm the  
18 deposition dates.

19 THE COURT: Even if you don't have the ESI by then?

20 MS. NURHUSSEIN: What we indicated to MSL is that all  
21 of these dates are contingent on us receiving the data two  
22 weeks ahead.

23 THE COURT: What's the point? Your request is denied.  
24 At this point it's premature. Or I'll give you two choices. I  
25 will fix those dates, including quite possibly saying whatever

1 you ask for in your letter you get but they are not  
2 adjournable. To go through hoops and say this person will be  
3 made available on March 22, whatever date you said, and the  
4 next person will be March 24, and then have the whole thing  
5 blow up because we haven't talked about and it's been months  
6 and months and other than the fact that I'm probably just going  
7 to rule on it all today, I hope, you're making no progress on  
8 the ESI. Once we agree on a protocol, it is not something that  
9 is likely to get achieved in two minutes.

10 MS. NURHUSSEIN: I understand, your Honor. The only  
11 reason I raise it is because --

12 THE COURT: Do you want a ruling? That's what I'm  
13 asking you. If not, it's half an hour into the conference.  
14 Tell me what ruling you want.

15 MS. NURHUSSEIN: Your Honor, I think your ruling from  
16 earlier today requiring the defendants to respond in a timely  
17 manner --

18 THE COURT: The response now is going to be it's  
19 premature. Come on. Somebody practice law. I'm really not  
20 happy with this.

21 MS. NURHUSSEIN: I understand, your Honor. I think we  
22 can resolve it among ourselves.

23 THE COURT: I doubt you can, but I don't think you can  
24 get a court order now, because you don't know what you want.

25 My inclination on all of this is even if it requires

1 me to extend the discovery schedule because I'm having so much  
2 fun with all of you that I want to keep the pleasure going --  
3 note my sarcasm -- I would rather, because of the expense  
4 involved here and the size of the case, take this in stages.  
5 If that means defendants' proposal wins across the board, which  
6 it probably won't, so be it. Let's get something happening  
7 with however many custodians that means.

8 I must say I have a better memory of all your letters  
9 before you all canceled or postponed the conference because of  
10 somebody's availability. But we will all get back into it.  
11 But that is certainly my inclination.

12 My second inclination is to remind you that at the  
13 moment the only plaintiffs are the plaintiffs who are in the  
14 case. I'm not giving you discovery as to class issues other  
15 than whether there should be a class or collective action.  
16 Basically, as I read some of this, you are going on the  
17 assumption that it's going to be a class and collective action  
18 on the plaintiffs' side even though you refuse to make a motion  
19 on that until after all discovery is over, but you want all  
20 discovery on that. You're not getting it.

21 I remind you we talked about this last time as to the  
22 date for your motion. And particularly now that the case is no  
23 longer in front of Judge Sullivan, it seems to me at least the  
24 collective action application needs to be made very quickly.  
25 How soon can you do it?

1 MS. NURHUSSEIN: Your Honor, I'll allow Ms. Wipper to  
2 address that.

3 THE COURT: Ms. Wipper.

4 MS. WIPPER: Your Honor, we would object to moving the  
5 briefing schedule to an earlier period given the discovery  
6 disputes in this case.

7 THE COURT: That wasn't my question. My question is,  
8 how soon can you do it? Democracy ends very quickly here,  
9 meaning you don't want to give me a date other than no later  
10 than April 1, 2013. I get to pick the date and you get to  
11 whine to Judge Carter. Collective action is a very easy  
12 standard. The preliminary collective action motion is very  
13 easy.

14 MS. WIPPER: However, your Honor, it's not clear what  
15 standard would be applied to the collective action, because  
16 discovery has already commenced. In order to prove a common  
17 policy as well as pay disparities and to show that the  
18 plaintiffs are similarly situated to the other public relations  
19 employees at the company, we would need discovery. The case  
20 law has two standards. It has the conditional certification  
21 standard at the commencement of the action.

22 THE COURT: Ms. Wipper, that's what I'm talking about.  
23 You haven't had enough discovery to say we are beyond that.  
24 That's the standard. How soon? Last chance.

25 MS. WIPPER: Your Honor, there is no guarantee what

1 standard would be applied. That would be up to Judge Carter.

2 Depending on his judgment on the level of discovery --

3 THE COURT: Ms. Wipper, your motion is due two weeks  
4 from today. Thank you very much for not participating. I'm  
5 also withdrawing your ability to participate telephonically in  
6 the future.

7 MS. WIPPER: Your Honor, can I ask you to reconsider  
8 given the fact that we don't have the payroll data?

9 THE COURT: No. February 29th. I'll give you one  
10 extra week. February 29th. If you don't move by that point,  
11 you never get to move. Of course, you can do what you have  
12 done before, which is take objections to Judge Carter so he can  
13 enjoy the fun I'm having with all of you. If he affirms me and  
14 you haven't moved by that point, you don't get to ever move,  
15 period. That takes care of that.

16 MS. WIPPER: Your Honor, plaintiffs request that you  
17 issue a written order.

18 THE COURT: You're very close to getting not only your  
19 telephone privileges removed but your pro hac vice removed.  
20 You have a written order. It's called the transcript. If you  
21 want to object to every single ruling I make, feel free. The  
22 rules allow you to do that. Does it make me happy? You figure  
23 that out.

24 Would you like to have your pro hac withdrawn or would  
25 you like to learn the rules of the Southern District of New

1 York, counsel? Do you want to practice in California? Do you  
2 want me to transfer this case to California? I'd be happy to  
3 do that. This is ridiculous, Ms. Wipper. Do you have anything  
4 to say? Are you there?

5 MS. WIPPER: Yes, I'm here, your Honor. No, your  
6 Honor. I would just say that we are complying fully with the  
7 local rules of the Southern District of New York as well as  
8 your individual rules.

9 THE COURT: What local rule says I've got to give you  
10 a written order other than a transcript?

11 MS. WIPPER: I was just requesting it, your Honor.

12 THE COURT: It's not the first time you have requested  
13 it and been told we don't do it that way.

14 MS. WIPPER: OK, your Honor.

15 THE COURT: Off the record.

16 (Discussion off the record).

17 THE COURT: Do you want to start with custodians or  
18 sources of ESI? What's your pleasure?

19 MR. ANDERS: Custodians, your Honor, if you wouldn't  
20 mind.

21 THE COURT: OK. Let me get the letters organized.  
22 What is the dispute on custodians? Let's get you to summarize  
23 your positions.

24 MR. ANDERS: Thank you, your Honor. In short, we  
25 believe that 30 custodians is more than sufficient for the

1 first phase of ESI. Using your Honor's most recent date  
2 rulings, the 30 custodians that we have suggested is 2.5,  
3 approximately 2.5 million documents. Those custodians consist  
4 of several high-level officers, including the president Jim  
5 Tsokanos, other members of the executive team, the majority of  
6 the HR staff, including the upper level HR people, and a number  
7 of managing directors.

8 It is our belief that given plaintiffs' theory of the  
9 case, there was a centralized management team that directed the  
10 alleged discriminatory behavior, that this group is the group  
11 most likely to contain relevant emails and documents.

12 Certainly if that review identifies other custodians, we would  
13 consider reviewing additional custodians. But we believe the  
14 appropriate step is to review these 30 custodians. Again, that  
15 date is set after the duplication is approximately 2.5 million  
16 documents.

17 THE COURT: What are the other custodians that you  
18 want, Ms. Bains?

19 MS. BAINS: Your Honor, the other custodians we want,  
20 we included one in error, number 41 Donnelly. That was subject  
21 to your ruling about entities under MSL, so that was in error.  
22 Other than that, all of the other custodians are managing  
23 directors. And the CEO and former CEO of MSL, Olivier Fleurot  
24 and Mark Haas, who we have emails already showing that they  
25 made decisions that affected employees in America about pay and



1 promotion, including the pay freeze, we think those especially.

2 THE COURT: Slow down one minute. Which exhibit is  
3 your custodian list?

4 MS. BAINS: The custodians are listed at the beginning  
5 of page 17 of the protocol.

6 THE COURT: Thank you. How many of these 44, or we  
7 are now down to 43, are ones that are in dispute?

8 MS. BAINS: There are 7. Start with the ones that are  
9 starred with the comparators that the parties agreed last time  
10 and defense counsel represented to the Court that we would cull  
11 down those database sets before adding them to Axcelerate. It  
12 seems that defense counsel has withdrawn that.

13 THE COURT: Let's deal with the 7 comparators.

14 MR. ANDERS: Thank you, your Honor. If you look at  
15 the record of the last time we were here, we did not agree to  
16 do anything. What we agreed was that we would first take a  
17 look at those accounts and then make the decision. We were  
18 willing to consider. We never made an affirmative agreement to  
19 do anything.

20 Our current position is for these additional people,  
21 we don't believe they should be included as it relates to the  
22 comparators. Our feeling is that as comparators, we don't see  
23 what in their email accounts could be of relevance to decisions  
24 made about them. Certainly emails from higher-ups about their  
25 employment, we have those people. But I don't see what in the

1 comparators' email account could be relevant.

2 THE COURT: Ms. Bains?

3 MS. BAINS: On that theory there is a comparator  
4 already on the defendants' list, number 6, Kelly Dencker. If  
5 we are going to throw out all comparators, we would like to get  
6 in all decision-makers instead of taking up a spot.

7 THE COURT: There is no magic number. If you're  
8 telling me you don't want Kelly Dencker even though they wanted  
9 it, I'm sure they are going to be happy to reduce the list, and  
10 that will make their list 29 subject to whoever gets added. So  
11 be careful what you wish for. Let's erase Kelly Dencker. Do  
12 you want Kelly Dencker or not?

13 MS. BAINS: We want Kelly Dencker if we are going to  
14 include comparators.

15 THE COURT: Tell me about comparators, what it is that  
16 means when you run the same email search.

17 I have another case that we have stalled a few times  
18 and it is now their turn. I'm going to put you on hold, Ms.  
19 Wipper. Ms. Wipper, you're going to have to be disconnected.  
20 You can call back in 15 minutes.

21 MS. WIPPER: OK, your Honor.

22 (Recess)

23 MS. BAINS: I think we were talking about comparators.  
24 We think that the comparators are important because their  
25 emails will contain important discussion of their job duties,

1 which is directly relevant to the claims, especially for the  
2 EPA claims.

3 THE COURT: Aren't you better off deposing? Is there  
4 any dispute as to what their job duties are?

5 MS. BAINS: Yes. In the depositions of the  
6 plaintiffs, already plaintiffs have claimed that some men were  
7 comparators, and the questioning was geared towards showing  
8 that those particular men were not their comparators based on  
9 their job duties, etc.

10 THE COURT: I guess my question is, and I'd have to go  
11 back and look at all your predictive coding approach to this,  
12 unless you run the comparators as a separate unit, are all the  
13 other things you're asking for the other 30-plus relevant from  
14 the comparators? And by asking for job responsibility type  
15 information through an email search, are you then getting that  
16 from everybody, including the president of the company? I'm  
17 not quite sure how, since you want different things from these  
18 people, that would work out.

19 MS. BAINS: We propose to do a targeted search before  
20 adding the comparators so that they would be culled down to  
21 just the issues that would be relevant to comparators before  
22 they are added.

23 THE COURT: How are you targeting that search, so to  
24 speak?

25 MS. BAINS: We wanted to give search terms to defense

1 counsel, but then defense counsel said they were taking them  
2 off completely. We would like to create a search term list to  
3 apply to the comparators' mailboxes before they are added to  
4 the Axcelerate system and subjected to predictive coding.

5 THE COURT: Then what?

6 MS. BAINS: Subject them to predictive coding.

7 THE COURT: Subjecting them to predictive coding,  
8 unless you are searching their data for this, you are reducing  
9 the volume, but that means that whatever the words are or the  
10 seeds are is going to run across all 37 to 44 people. It makes  
11 no sense to me. If you want to get your ESI consultant help me  
12 out, that's fine.

13 MS. BAINS: Yes, please.

14 MR. NEALE: Your Honor, Paul Neale. I think in this  
15 instance the way to address that would be to add another  
16 category to the seed set review that would relate to the issues  
17 associated with the comparators.

18 THE COURT: What I think I'm hearing, and maybe I'm  
19 wrong here, it seems to me that the search of the comparators  
20 data is totally different from the search of everybody else.

21 MR. ANDERS: Your Honor, not only is it totally  
22 different, but if they are looking for emails which would tend  
23 to show their job duties, that is going to be most of their  
24 emails. Conceivably, there will be emails saying do you want  
25 to handle this meeting or here is a PowerPoint for the next

1 presentation. I am having difficulty even understanding how we  
2 would find those types of emails. It is almost every email  
3 related to their job and what they are doing.

4 THE COURT: Mr. Neale?

5 MR. NEALE: I think there are two approaches here,  
6 your Honor. We will discuss predictive coding, but the random  
7 sampling of the total document set will bring documents up  
8 regardless of what search term they were or weren't responsive  
9 to, so you will see comparator data during that process.

10 THE COURT: This is a case where the plaintiffs worked  
11 at the company. What is it that you expect to see in the  
12 comparators' email that is relevant? Describe the concepts to  
13 me. Frankly, I don't disagree that whether they are  
14 comparators or not is a relevant issue, but I don't see why, if  
15 you want to find out what their job duties were and these  
16 people have no stake in the case, you don't just take their  
17 deposition.

18 MS. BAINS: We do want to take their depositions. To  
19 answer your question about the specific things we would be  
20 looking for, for example, one of the plaintiffs testified about  
21 her job duties, including client contact. We would look for  
22 client contact in the comparators.

23 THE COURT: That's ridiculous. That means basically  
24 forget sophisticated searches, any email from one of these  
25 comparators to or from a client is relevant?

1 MS. BAINS: I mean on the substantive issues regarding  
2 contacts.

3 THE COURT: How do you train a computer for that? How  
4 do you do a key word on that? I'm having a very hard time  
5 seeing what it is you expect. You've got the plaintiffs'  
6 emails. If you don't have their emails, you have their memory  
7 of them. If comparator whoever, Kelly Dencker, I don't know if  
8 that is a he Kelly or a she Kelly, but if Kelly wrote to a  
9 client and said, I'd like to meet with you next week to discuss  
10 the following presentation, that's what you're looking for?

11 MS. BAINS: That would be part of it.

12 THE COURT: What else? You keep giving me this is  
13 part of it. If you want me to order this done, you've got to  
14 tell me how it is that it could be done in a reasonable way.

15 MS. BAINS: I think we could treat the comparators as  
16 a separate search.

17 THE COURT: Then what is that search going to be?  
18 Also, by the way, we've gone from throw the comparators into  
19 the bundle but do a little key word screening first to reduce  
20 volume to now we are at the let's do the comparators separate,  
21 and I'm still not hearing how you're going to search through  
22 their emails separately.

23 MS. BAINS: One of our allegations is that they were  
24 given opportunities, including job assignments, etc., that  
25 plaintiffs weren't.

1 THE COURT: That is basically every substantive email,  
2 every business email they have. All right, comparators are out  
3 at this time without prejudice to you coming up with some  
4 scientific way to get at this. Otherwise, take the deposition  
5 and go from there.

6 I think we are down to six or seven where you  
7 disagree.

8 MS. BAINS: There are about eight. All of the other  
9 eight are managing directors or the CEO, former CEO, of the  
10 company.

11 THE COURT: If the former CEO is before the time  
12 period that you allege the discrimination started --

13 MS. BAINS: It's within the class period.

14 THE COURT: When was the last time the former CEO was  
15 the CEO?

16 MS. BAINS: 2009.

17 MR. ANDERS: April '09.

18 THE COURT: Remind me when the class period starts  
19 here.

20 MS. BAINS: 2008 for promotions and pregnancy  
21 discrimination and pay, but 2005 for --

22 THE COURT: The pay I thought we are getting at for  
23 all the payroll data and other things. What is the anecdotal  
24 that you are looking for here?

25 MS. BAINS: That's not an issue here.

1 THE COURT: Good.

2 MS. BAINS: Because he started in 2009. I'm sorry.  
3 He was the CEO until 2009.

4 MR. ANDERS: Your Honor, one maybe very practical way  
5 to resolve the Olivier Fleurot issue. My understanding is that  
6 the majority or many of these emails are in French. We are not  
7 able to incorporate him with predictive coding of the English,  
8 the majority of the other emails. I think just from a language  
9 standpoint alone that would warrant not including in him in the  
10 first set, if at all.

11 MS. BAINS: I have an email in my hand that is in  
12 English from him.

13 THE COURT: If you want to do a cull that looks for  
14 only English language emails and excludes all the French,  
15 assuming that that can be done -- can that be done?

16 MR. ANDERS: I don't know, your Honor. I'm not sure  
17 if that can be done.

18 THE COURT: Tell me who your expert is and let me hear  
19 from him.

20 MR. ANDERS: This is David Baskin. He is with  
21 Recommind.

22 THE COURT: OK.

23 MR. BASKIN: There is a language filter that is  
24 roughly 80 percent accurate in it's association of French to  
25 English.



1 THE COURT: I'm sorry? I didn't hear.

2 MR. BASKIN: In association of French to English, it  
3 is 80 percent accurate. There is a language filter that is  
4 about 80 percent accurate.

5 THE COURT: Knowing we're not getting 100 percent  
6 accurate, it can filter out all the French emails with 80  
7 percent accuracy?

8 MR. BASKIN: Filter out French and English emails as  
9 well as other languages.

10 THE COURT: Where was this person located and what did  
11 he do?

12 MR. ANDERS: He was located in France, your Honor.

13 MR. BRECHER: Are we talking about Olivier Fleurot?

14 THE COURT: Yes.

15 MR. BRECHER: He is the CEO, and he joined I believe  
16 it was in May of 2009. He is located in Paris.

17 THE COURT: I thought we were talking about --

18 MR. BRECHER: There are two people. There is Mark  
19 Haas, who is the former CEO.

20 THE COURT: Who are we talking about? I thought we  
21 were talking with the former CEO.

22 MS. BAINS: I thought we were, too.

23 THE COURT: Come on. Somebody try to stay on one  
24 person. Mark Haas, who is he, where was he located, why isn't  
25 he being searched?

1 MR. BRECHER: He's in New York.

2 THE COURT: Why shouldn't he be searched?

3 MR. ANDERS: Your Honor, I think there are certainly a  
4 lot of people we could possibly search.

5 THE COURT: Right now the dispute at 4 o'clock is  
6 apparent between 6 or 7 people, between your list of 30, which  
7 became 29, and their list of 44, which lost 8 people because  
8 they were comparators.

9 MR. ANDERS: Your Honor, I think we are starting to  
10 get duplicative now. We have Jim Tsokanos. He is the alleged  
11 key bad actor. We have his email accounts. Certainly emails  
12 from Mr. Haas and other people will be included in there. Once  
13 we see what is in there, maybe we can decide to expand it. My  
14 concern right now is the amount of time it takes --

15 THE COURT: What is the volume of Mr. Haas's email?

16 MR. ANDERS: 6,098.

17 THE COURT: Include them. Let's not fight over the  
18 miniscule. Now, who is the Frenchman? That is Olivier  
19 Fleurot?

20 MR. ANDERS: Yes.

21 THE COURT: Why is he relevant?

22 MS. BAINS: He is the successor to Mark Haas. He is  
23 the CEO of MSL Group. We have emails from the few that were  
24 already produced that show that he had discretion over pay and  
25 promotion decisions, particularly a companywide salary freeze,

1 and he was on correspondence regarding exceptions to the salary  
2 and pay increase freeze. We think his emails, especially given  
3 our theory of the case that it is coming from the highest  
4 levels of the company, his emails would be one of the most  
5 probative.

6 MR. ANDERS: Your Honor, if it is coming from him,  
7 then he's obviously directing it to somebody. Those would be  
8 the people we already have in the U.S.

9 THE COURT: We have one other issue here, which is if  
10 his emails are either in France physically or coming from  
11 France, you've got the privacy and blocking statute. Let's  
12 leave him out from the first wave and only deal with his emails  
13 that are in the U.S. because they went to somebody else.

14 MS. BAINS: Your Honor, can I have my expert address  
15 the issue of phasing of the custodians?

16 THE COURT: Sure.

17 MS. BAINS: And the effect on predictive coding?

18 MR. NEALE: One of the issues is agreeing on sources,  
19 and custodians fall into that. In the way we are defining  
20 phases, I think, as we have been discussing them, the protocol  
21 identifies effectively three phases, phase 1, phase 2, and a  
22 to-be-determined phase added by the defendant in their draft.

23 While I think we all agree that a phased approach  
24 makes sense to deal with the high priority stuff immediately  
25 and factor in the phase 2 stuff, the way that we have been

1 talking with the defense is their view is we should finish  
2 phase 1 altogether before even considering what falls into  
3 phase 2 and what to do with it. Given the time line associated  
4 with this process and the scope of discovery, I don't see us  
5 finishing phase 1 before the discovery deadline approaches.

6 THE COURT: If that's the only problem, I'll extend  
7 the discovery cutoff date.

8 MR. ANDERS: Your Honor, I apologize, but we haven't  
9 finished the custodians yet.

10 THE COURT: This is custodian-oriented.

11 MR. NEALE: The suggestion was moving certain  
12 custodians into phase 2. I'm just saying if we add that to the  
13 sources, among the sources that are phase 2, it raises the  
14 issue that --

15 THE COURT: If that's the only problem, which is  
16 timing, I can deal with that.

17 Two down, four or five to go. Who is next?

18 MS. BAINS: All of the others are managing directors.

19 THE COURT: Where are they located and are they the  
20 managing directors of any office that a named plaintiff works  
21 in?

22 MS. BAINS: The first is Steve Bryant. It's managing  
23 director.

24 THE COURT: Give me the number from your page 17-18.

25 MS. BAINS: Number 32.

1 THE COURT: What office is he?

2 MS. BAINS: Seattle.

3 THE COURT: Does any plaintiff work in Seattle?

4 MS. BAINS: None of the current plaintiffs.

5 THE COURT: That's what we are taking discovery on.  
6 He's out, as is any other managing director of an office that  
7 doesn't have a plaintiff working at it. Despite your colleague  
8 in San Francisco not liking my approach, that's why you're  
9 going to do your conditional certification sooner rather than  
10 later. You get some plaintiffs who work in Seattle opting in,  
11 and we have to reconsider this.

12 MS. BAINS: The next is number 34, Carl Farnham,  
13 managing director of Atlanta. We have a plaintiff from plant a  
14 who worked in the Atlanta office.

15 THE COURT: During the period that Mr. Farnham worked  
16 there?

17 MS. BAINS: I don't have that information with me.

18 MR. ANDERS: Your Honor, our understanding is he  
19 became the managing director in June of 2010, and at that point  
20 no plaintiffs were working in the Atlanta office.

21 THE COURT: Based on that representation, he's out.  
22 Next.

23 MS. BAINS: The next is Megan Gross.

24 THE COURT: Number 36.

25 MR. ANDERS: Your Honor, she became a managing

1 director in May of 2011, which is after the cutoff date that  
2 your Honor prescribed on January 4th.

3 MS. BAINS: That issue is with Judge Carter, so we  
4 understand that ruling.

5 THE COURT: Then why are you wasting my time?

6 MS. BAINS: If it's overturned --

7 THE COURT: If it's overturned, you can make an  
8 application for me to consider things. At the moment I win  
9 until someone says I don't. Anyone else?

10 MS. BAINS: The next is number 40, Kelly Cohagen, MSL  
11 Detroit.

12 THE COURT: Have you got a plaintiff in Detroit?

13 MS. BAINS: No, we don't.

14 THE COURT: My ruling is on any office you don't have  
15 a plaintiff, you don't get the managing director of that  
16 office. Do I have to name each one individually?

17 MS. BAINS: No. That ruling would also apply to  
18 number 42, Michael Morsman.

19 THE COURT: Good.

20 MS. BAINS: Actually, I'm sorry, I misspoke. Michael  
21 Morsman was the managing director of the one of the named  
22 plaintiffs.

23 THE COURT: Time period, who, what, where, when?

24 MS. BAINS: Plaintiff Laurie Mayers.

25 THE COURT: Mr. Anders, do you want to help out there?

1 MR. ANDERS: I'm looking, your Honor. Your Honor, all  
2 I can tell you is he was hired in January of '09 and terminated  
3 in May of 2010. I don't know in that interim for what period  
4 of time he was a managing director.

5 THE COURT: Ms. Bains, it's your application.

6 MS. BAINS: We are looking to verify the dates.

7 MR. ANDERS: Your Honor, I will note that there are no  
8 allegations in the amended complaint regarding Mr. Morsman.

9 MS. BAINS: There are. Paragraph 109.

10 THE COURT: I'm sorry. What?

11 MS. BAINS: There are allegations in paragraph 109 and  
12 later.

13 THE COURT: That's not the question.

14 MS. BAINS: Plaintiff Laurie Mayers worked until May  
15 2010.

16 THE COURT: Any reason Morsman shouldn't be in? I  
17 assume before arguing over this you do have his email?

18 MR. ANDERS: Yes, your Honor. We haven't collected it  
19 from the client yet, but it exists, and there are 29,000.

20 THE COURT: Collect it. Who else?

21 MS. BAINS: The last is Matthew Gardner. We have one  
22 plaintiff in San Francisco, but I don't believe it was during  
23 the same time period.

24 THE COURT: Then he is out. We have now agreed on  
25 custodians.

1 MS. BAINS: There is one other issue with custodians.  
2 The defense has date-limited many of the custodians, and we are  
3 not sure what those date limitations refer to. I wanted to get  
4 a little more information on that.

5 THE COURT: Mr. Anders?

6 MR. ANDERS: Yes, your Honor. The date limitations  
7 generally refer to the period of time for the managing  
8 directors that they were overseeing one of the plaintiffs. For  
9 the later set of individuals, and that's numbers 25 through 29  
10 on our list, those date limitations correspond to the Court's  
11 ruling as it relates to the applicable time period.

12 THE COURT: That makes sense. The question is for the  
13 ones that are shorter time periods, such as number 21, Donald  
14 Hannaford, on your list.

15 MR. BRECHER: Judge, this is Jeff Brecher. Don  
16 Hannaford was a managing director of the, I believe, D.C.  
17 office. There is one plaintiff, Heather Pierce, who moved to  
18 the D.C. office. That is the period of time when both were  
19 employed in the D.C. office. He left I believe in March of  
20 2008, and she arrived in January of 2008 in the D.C. office.  
21 She used to work in the San Francisco office.

22 THE COURT: With those explanations, any problem with  
23 the dates?

24 MS. BAINS: No, to be consistent with your rulings.  
25 However, we would like to double-check all these facts after.



1 THE COURT: That's fine.

2 MS. BAINS: Also, can Mr. Brecher explain the date  
3 restrictions for number 23, Neil Dillon? I think the  
4 explanation was given that a certain plaintiff was there during  
5 those times, but the dates don't seem to match to us.

6 MR. BRECHER: I was speaking about Don Hannaford.  
7 That's what we were talking about.

8 MS. BAINS: In the last meet-and-confer.

9 MR. BRECHER: Neil Dillon, I believe, was the next  
10 managing director in D.C., and I believe that time period  
11 reflects the period where he was employed and where Ms. Pierce  
12 was employed. If that is inaccurate, then we can reconsider,  
13 but I believe that is accurate.

14 MS. BAINS: Again, like the others, we would like to  
15 check the facts.

16 THE COURT: You can all check out the dates. If there  
17 is a slight variant, hopefully you can reach agreement. If  
18 not, you will bring it back to me.

19 MS. BAINS: Thank you, your Honor.

20 THE COURT: Sources beyond custodians. What is this  
21 sources about laptops or whatever before we get to predictive  
22 coding and some of the shared drives and other things?

23 MS. BAINS: Plaintiffs would have liked to have seen  
24 all of the data or run searches on the data from laptops, home  
25 directories, and desktops. The defense counsel expressed

1 concern that that would be too burdensome, so we came up with a  
2 duplication testing theory. We suggested 7 custodians and they  
3 suggested 2. We just think 2 is too little to do any sort of  
4 testing, especially as a run against the sample of the total  
5 number of custodians is not a significant percentage.

6 THE COURT: When you say home directories, are you  
7 talking about home computers? No?

8 MS. BAINS: No. The directories on the work  
9 computers.

10 THE COURT: I think this may be ones where the  
11 consultants are more useful to me than the lawyers. Let's  
12 start with Mr. Neale.

13 MR. NEALE: Your Honor, there are certain sources that  
14 are controlled by custodians, like laptops, desktops, and the  
15 home directories are the My Documents folder to which they  
16 would save information. In our discussions with defendants,  
17 they represented they thought that that information would be  
18 wholly duplicative of attachments and things that are in the  
19 LTA.

20 We had suggested early on that we pick some number of  
21 folks and do a comparison between that dataset and what is in  
22 the LTA to get a sense of the rate of the duplication. If it  
23 was high, then perhaps we would agree that those sources don't  
24 need to be addressed. Since

25 then, we just haven't been able to agree on the

1 number. As Ms. Bains said, we suggested 7, they suggested 2.  
2 We just don't think 2 will be representative enough to give a  
3 good sense as to whether they are truly duplicative or not.

4 THE COURT: Let me hear from --

5 MR. ANDERS: Your Honor, I don't know if we disagree  
6 on the technical aspect.

7 THE COURT: If you don't disagree on the technical why  
8 2/why not 7, why not the old split the baby?

9 MR. ANDERS: Your Honor, if you look at our letter, we  
10 don't believe any should be done at this point, for a number of  
11 reasons. One is if there is a comparison, and even if it is  
12 shown that there are some differences in the types of  
13 documents, the next level of inquiry is, OK, what are the  
14 different documents that are in the home directories and are  
15 they even relevant, do we even care about them?

16 Our position is before addressing the home directories  
17 or the computers, complete the search of the emails. Let's  
18 find out what documents exist there, and then at that point  
19 decide is it worth the cost to start looking at the laptops and  
20 the home directories. If it is, and we do a comparison, there  
21 is still --

22 THE COURT: Did you or did you not agree to do it at  
23 one point for 2 custodians?

24 MR. ANDERS: Yes, your Honor, we initially suggested  
25 that.

1 THE COURT: Do 2 and we will see where that goes.

2 MR. ANDERS: OK.

3 THE COURT: What's next?

4 MS. BAINS: The other sources.

5 THE COURT: Where is that in your exhibit and their  
6 exhibit?

7 MS. BAINS: In the letters?

8 THE COURT: No. I know where it is in the letters.  
9 There are all sorts of lists.

10 MS. BAINS: In the protocol it begins on page 3. My  
11 expert can speak to the phasing and technical aspects. If we  
12 want to go source by source and talk about the substance of the  
13 sources, I can address that.

14 THE COURT: I think I want to talk about the substance  
15 of the sources. What page is it on your Exhibit D on the  
16 defense side?

17 MS. BAINS: We submitted a joint protocol on January  
18 25th. It was an attachment to plaintiff's letter.

19 THE COURT: That's what I'm looking at or not?

20 MS. BAINS: Yes.

21 MR. ANDERS: Pages 3 and 4, your Honor, of the joint  
22 protocol. The first chart is plaintiffs' proposal. The second  
23 chart is ours. If it makes it easier, your Honor, I could  
24 explain the, I think, 6 items we differ on.

25 THE COURT: That's all I need to know about.

1 MR. ANDERS: There was the home directories, which  
2 your Honor just addressed. The next would be the shared  
3 folders. These are folders that different groups have shared  
4 access to. Plaintiffs had asked for a directory tree of all  
5 these shared folders within MSL. We spoke to the IT  
6 department, and they said that is not something that they can  
7 easily generate.

8 We located HR shared drives. These are shared drives  
9 issued by the HR department. There is a corporate HR drive,  
10 there is a North America HR drive, and then there are several  
11 local drives. What we proposed was doing a manual review of  
12 all the documents in the corporate and North America as well as  
13 New York HR drive for documents. The types of documents, your  
14 Honor, that are in these folders, there are templates, there  
15 are form letters, there are some training programs, there are  
16 some other general HR documents.

17 We also have the shared drives for some of the other  
18 local offices. All told, if you take everything we have, that  
19 is 40,000 documents. We are proposing to take the corporate  
20 and North America, which are the more general HR drives, plus  
21 the New York One, review those manually. Based on the theory  
22 of the case, we would think that the general HR directories  
23 would be the ones most relevant and review those three main  
24 ones and do that outside of the predictive coding.

25 THE COURT: Let's take this in two steps. For HR, are

1 there other shared folders you want reviewed?

2 MS. BAINS: Yes, the local folders at least.

3 THE COURT: Whose local folders?

4 MS. BAINS: The local HR folders.

5 THE COURT: What is in the shared material? It seems  
6 to me if we are talking about forms and templates, doing the  
7 corporate, New York America, and New York probably is enough.  
8 If you are telling me these are also where people do shared  
9 work type material, that's a different story.

10 MS. BAINS: We deposed the HR director last week, and  
11 she noted that a lot of complaints don't even come to her, that  
12 she is in New York, and that the local HR people deal with  
13 them.

14 THE COURT: Would it be in the shared folder?

15 MS. BAINS: I think you would have to ask defense,  
16 because we don't have access and they haven't given us a  
17 directory listing.

18 THE COURT: It would really be nice if you folks  
19 talked to each other substantively. What's in the shared  
20 folders? Let's limit it to HR for the moment.

21 MR. ANDERS: Other than what I have represented  
22 before, your Honor --

23 THE COURT: Let me put it a different way. If an  
24 employee made some sort of complaint to HR about  
25 discrimination, pay issues, or whatever, and for whatever

1 reason it crossed two offices or more than one person was  
2 working on handling the matter, would that be in a shared  
3 folder?

4 MR. ANDERS: I don't know, your Honor. I can tell you  
5 from my cursory general review going through folders, I didn't  
6 see anything like that. There are thousands of folders, and I  
7 didn't review every one. I don't know the answer to that  
8 question.

9 THE COURT: I understand that. But they are your  
10 clients. At the moment I can't rule on the shared folders  
11 until somebody tells me what's in it. Right now the shared  
12 folders are up in the air except for the three that they have  
13 agreed to include in phase 1.

14 MR. ANDERS: Your Honor, thank you. Just so I'm clear  
15 about the ones we are reviewing in phase 1, I don't believe we  
16 are going to review every single document, but certainly we are  
17 going to look at the folders. If a certain folder has ten  
18 documents of a certain type not relevant, we are going to move  
19 on. We are going to do it judgmentally.

20 THE COURT: You are going to do it judgmentally with  
21 the assistance of your clients.

22 MS. BAINS: Your Honor, for the other non-HR folders,  
23 we need some sort of indication of what's in there.

24 THE COURT: Either you folks are going to talk to each  
25 other and develop the information cooperatively or you're going

1 to spend the money and take a 30(b)(6) deposition or hundreds  
2 of 30(b)(6) depositions. They are only saying it doesn't go in  
3 phase 1, it goes in phase 2, so already you may be getting it.

4 Number two, I can't rule until I know what you mean by  
5 shared folders. In some corporations the shared folders are  
6 templates and the like that somebody then pulls down off the  
7 shared folders onto their drive and then uses to create a memo  
8 or an action or whatever. In other companies people do  
9 document drafting collectively.

10 I have no idea what you are talking about here.  
11 Absent information, it stays in round 2. In the meantime, talk  
12 to each other.

13 What's the next category?

14 MR. ANDERS: Your Honor, the next category is the  
15 company's corporate intranet otherwise known as Noovoo,  
16 N-O-O-V-O-O. We explain in page 9 of our January 25th letter  
17 at page 10, that the type of information in Noovoo is general  
18 information for employees. This includes press releases and  
19 other company notices, for example, notices regarding upcoming  
20 system maintenance, an employee directory.

21 There are more form documents and templates, such as  
22 sample PowerPoint decks, electronic company logos that can be  
23 used. There is information regarding company contests, job  
24 openings, information about the worldwide offices. It's  
25 generalized employee information.



1 THE COURT: Job openings may be the only thing that  
2 sounds relevant out of that, and even that is questionable.

3 Ms. Bains?

4 MS. BAINS: Your Honor, counsel also told us that  
5 there are employment policies in Noovoo. Also, the HR deponent  
6 said that she accesses Noovoo to get employment policies. We  
7 think those are relevant.

8 MR. ANDERS: We have given employment policies. They  
9 may exist in Noovoo, but they I believe would exist elsewhere.  
10 They have asked for employment policies. We have given them.  
11 Now we are focusing on searching the intranet, which is another  
12 place where certain information is stored.

13 THE COURT: Search Noovoo for any documents that are  
14 employment policies documents. It may be redundant, but there  
15 is no way to know that unless you do it.

16 Is there anything else, Ms. Bains, from what you have  
17 learned that seems relevant in this?

18 MS. BAINS: That's all from what we have learned.

19 THE COURT: Your clients worked there. I know they  
20 didn't necessarily work in every department. But if you can't  
21 give me a basis for saying that the defendants are wrong -- and  
22 in this case I'm not saying you will never get it, the issue is  
23 is it a phase 1 or phase 2 or phase 3 approach -- it seems to  
24 me, considering how expensive this case is already going to be  
25 for discovery, under 26(b)(2)(C) you have not met your burden.

1 MS. BAINS: Can we clarify the phase? I think the  
2 parties have a different opinion.

3 THE COURT: You're going to finish phase 1 ESI  
4 production. You're going to have a chance to review that. We  
5 are going to set a deadline for it once we finish the rest of  
6 the ramifications that you are in dispute over. Then we are  
7 going to do phase 1.

8 If as a result of phase 1, depending on both the cost  
9 to the defendants, the information developed, and everything  
10 else, it is appropriate to go to phase 2 or 3, we'll go there.  
11 If it isn't, it may be that you will do depositions in between,  
12 and only if you develop through the deposition enough  
13 information that shows we should spend the money to go past the  
14 phase 1, will we do so.

15 I can't determine what we are going to do. There is  
16 no sense in getting to phase 2 earlier than the completion of  
17 phase 1 or it defeats the whole purpose of phasing, which is to  
18 see what is out there.

19 MS. BAINS: I understand. I just had the impression  
20 that the defense's proposal was to do email only as phase 1 and  
21 everything after if costs allowed.

22 THE COURT: I'm going on what you are all telling me,  
23 which is what you are in dispute on. Reading defendants'  
24 position and your position, it seems like there is a lot of  
25 stuff in phase 1, such as Prism, PeopleSoft, corporate

1 feedback, Halogen, EMC SourceOne archive, and others.

2 MR. ANDERS: That's correct, your Honor.

3 MS. BAINS: Thank you.

4 THE COURT: What else is in dispute?

5 MR. ANDERS: The last item in dispute is a system  
6 called Hyperion Financial Management. That is the company's  
7 financial management program. That's where they have their P&L  
8 information. When we were here on January 4th, we had  
9 discussed this system in particular. The question that Ms.  
10 Wipper had was whether it contained information regarding  
11 budgets, bonus pools, and personnel costs.

12 We inquired and found out that it does not contain  
13 that information on an individualized level but rather more on  
14 a high-level and general basis. I don't see how that type of  
15 information, what their bonus pool or the personnel costs are,  
16 is relevant to this case.

17 MS. BAINS: Your Honor, this is a class case, so we  
18 are alleging high-level --

19 THE COURT: No, it's not. You refused to move in any  
20 way, shape, or form unless I beat you over the head to try to  
21 get the court to certify a class of any sort or even a  
22 collective action. Right now it's an action by whatever the  
23 number is, half a dozen, individual plaintiffs who hope someday  
24 that you will make a motion for class certification.

25 In any event, what difference does it make, even if

1 this were classwide, if, as they seem to be describing it, it  
2 shows that the budget for bonuses for the company for the year  
3 2009 was \$1 million or \$100 million? The issue is did your  
4 plaintiffs get a fair share of that compared to their  
5 comparators.

6 MS. BAINS: We anticipate that one of the business  
7 justifications will be that they just didn't have the money to  
8 pay people.

9 THE COURT: That's not anything I've heard in the  
10 case. Is that one of the justifications? We have an answer.  
11 It would seem to me that that would be something that is an  
12 affirmative or other defense that would have been included in  
13 the answer.

14 MR. ANDERS: I think what the plaintiffs may be  
15 getting at is there was a salary freeze imposed at some point.  
16 Whether or not the it was a good decision or bad decision to  
17 freeze the salary, they imposed a salary freeze. I don't think  
18 this case is about whether or not that was a good decision.

19 THE COURT: I assume the freeze applied to everybody  
20 of every sex, age, and other protected class.

21 MR. ANDERS: Yes, your Honor.

22 MS. BAINS: We have emails showing that exceptions  
23 were made.

24 THE COURT: The exceptions may be relevant. What the  
25 total pool was or what the policy was has nothing to do with

1 the budget documents. What am I missing?

2 MS. BAINS: We believe the budget is closely tied to  
3 compensation policies. If there is information in there about  
4 what part of the budget is going to go to compensation, we  
5 think that would be relevant.

6 THE COURT: The request is denied. It's ridiculous.  
7 What else? Are we done with the sources?

8 MR. ANDERS: I believe so, your Honor.

9 THE COURT: Good. What's next?

10 MS. BAINS: I'm sorry. I think there was actually one  
11 more, Vurv Taleo, that was in this.

12 THE COURT: That's L on your list, talent recruitment  
13 software.

14 MS. BAINS: I understand that that contains  
15 information about job descriptions and job duties.

16 MR. ANDERS: Your Honor, that is essentially an  
17 applicant tracking program. It tracks an applicant through the  
18 hiring process, sort of the date that they applied, the date  
19 they had this interview, the date they had the next interview.  
20 Again, it's more of a tracking program.

21 THE COURT: Does it say in doing that we're tracking  
22 Sherlock Holmes, who applied for the job of consulting  
23 detective, and that job has the following requirements, and  
24 then we interviewed him on such and such a date? Or is it  
25 merely person, position, and date tracks?

1 MR. ANDERS: Your Honor, it will track specific  
2 individuals.

3 THE COURT: Does it have anything about what the job  
4 description for the job they are applying for is?

5 MR. ANDERS: I don't believe it does, your Honor. The  
6 individualized forms. If Sherlock Holmes was applying for a  
7 job and there was a printout on Sherlock Holmes's information,  
8 that does not have any information like a job description. It  
9 identifies the position, but it generally is a time line of on  
10 what days various -- this would be really individualized  
11 discovery.

12 THE COURT: Ms. Bains?

13 MS. BAINS: I have a question. Does this system also  
14 track current employees and promotions?

15 MR. ANDERS: It would track anybody that applied for a  
16 position, whether it's internal or not.

17 MS. BAINS: That's relevant. It's similar to the data  
18 provided by PeopleSoft for promotions analysis.

19 THE COURT: You have it with the other system. There  
20 has to be a limit to redundancy here.

21 MS. BAINS: Not the job qualifications. That's not in  
22 PeopleSoft.

23 THE COURT: That's not in this, either. Please listen  
24 to each other.

25 MS. BAINS: The job qualifications of the applicant?

1 THE COURT: Who cares?

2 MS. BAINS: It would be relevant if somebody is denied  
3 a promotion.

4 THE COURT: If you're telling me that your plaintiff  
5 applied for a particular position and you're comparing who was  
6 hired for it, that's relevant perhaps, if that's your theory.  
7 I don't think it is. But that is not going to be done through  
8 the Vurv Taleo system necessarily. I didn't hear anything here  
9 about it has the qualifications of the person applying. Did I  
10 miss something?

11 MR. ANDERS: No, your Honor.

12 MS. BAINS: The HR deponent testified that job  
13 applications and résumés could be accessed through Vurv Taleo.

14 MR. ANDERS: Again, your Honor, what I'm looking at is  
15 something that could be exported and printed out. I asked for  
16 a printout of what would a printout look like if I asked for  
17 all information on a particular individual. I received a  
18 sample report, and that's what I'm looking at.

19 THE COURT: Let me see the sample. Is any of this  
20 click-through? What I mean by that is, for example, it shows  
21 that so and so, quote, submitted profile. If I clicked on that  
22 and I were on the system live, would that bring up the profile?

23 MR. ANDERS: I don't know, your Honor.

24 THE COURT: Why don't you show this to Ms. Bains and  
25 see if that satisfies everybody that this system need not be

1 included. Now give the document back.

2 MS. BAINS: We ask that MSL verify that there are no  
3 résumés or job descriptions and that --

4 THE COURT: Come on. Job descriptions, you just  
5 looked at the document. This is the best way to resolve a lot  
6 of this stuff, to look at samples in the system. The only  
7 thing there might be is the job application, what is called the  
8 submitted profile, and I fail to see the relevance of that  
9 unless it is for a candidate who applied for the same job as  
10 your client and your client didn't get it. And I don't even  
11 believe that is one of the allegations in the case as to  
12 specific jobs as opposed to glass ceiling type issues in  
13 general perhaps.

14 MS. BAINS: I believe we do have allegations about  
15 certain promotions that were denied to plaintiffs.

16 THE COURT: Then give them a list of those promotions  
17 and if the Vurv Taleo system will show who else applied for  
18 that job. Again, unless it also gives the profile, i.e., job  
19 application of the person, it doesn't do the least bit of good.

20 MS. BAINS: That's fine.

21 MR. ANDERS: Your Honor, so I'm clear, within the  
22 system you can although search based on a specific position,  
23 not individual, that will have a job description. My  
24 understanding is we have already provided job descriptions. If  
25 their allegation is there was a specific position that they



1 were denied, we could search for that specific position.

2 MS. BAINS: That's fine.

3 THE COURT: That's how that will be handled, not part  
4 of the general protocol. That finishes the sources, at least  
5 as to the dispute between phase 1 and phase 2.

6 What's next?

7 MR. ANDERS: I think the actual protocol, your Honor,  
8 on the application of predictive coding.

9 THE COURT: What page are we on on the joint proposal?

10 MR. ANDERS: That begins, your Honor, at page 20, I  
11 believe.

12 MS. BAINS: Yes, page 20.

13 THE COURT: Since you all did this mostly in  
14 narrative, I guess if I look at number 3, that will take me  
15 through the specific?

16 MR. ANDERS: Yes.

17 THE COURT: What is the best way to figure out where  
18 you disagree? Whatever you agree on, I'm happy to let you  
19 agree upon.

20 MS. BAINS: I think it might make sense for us to each  
21 give a presentation of our position.

22 THE COURT: I'd rather do it issue by issue. If you  
23 give me your position with five to ten subparts, by the time  
24 you finish and they respond, it's going to be very hard for me  
25 to rule. So issue by issue.

1 MS. BAINS: May I have my expert address this?

2 THE COURT: Yes.

3 MR. NEALE: Your Honor, I think perhaps the best place  
4 to start is at the beginning of the process, which would in my  
5 view and I think in our discussions with defendants be at the  
6 point at which we determine what the confidence level within  
7 the predictive coding system will be set at.

8 There has been a lot of discussion between us about  
9 their use of 95 percent plus or minus 2, which drives the  
10 sample size that is going to be used at the various stages.  
11 Leaving the last conference, we were I think close to an  
12 agreement on the overall approach. The recent submission I  
13 think took a pretty sharp 180 away from it.

14 THE COURT: Don't be a lawyer, be a tech person.  
15 We're doing one issue at a time. 95 percent confidence level  
16 of what?

17 MR. NEALE: At a 95 percent confidence level against  
18 the number of documents in the system. The sample size would  
19 be 2,399 documents.

20 THE COURT: Go slowly. Two thousand what?

21 MR. NEALE: 399 documents.

22 THE COURT: OK.

23 MR. NEALE: The first point at which that would be  
24 applied would be the initial random sample, which is used to  
25 determine and give you a sense based on the review of those

1 documents what the likely percentage of relevance will be.

2 It's also used, in my understanding, as one of the components  
3 of the seed set that starts to train the system as to how you  
4 train relevance in the categories.

5 THE COURT: Let me back up one second. Are you all  
6 talking about training the seed set through a random sample or  
7 through a nonrandom sample based on already having found,  
8 through one method or another, certain key documents?

9 MR. NEALE: We are actually a great deal ahead of that  
10 process. You have your entire document collection. You  
11 randomly sample 2399 using that confidence level. At that  
12 point you do a review and determine what is relevant and  
13 what --

14 THE COURT: That's if you're doing a random sample  
15 seed.

16 MR. NEALE: We already agreed that that would be at a  
17 random sample level.

18 MR. ANDERS: I think this is maybe where we are  
19 disagreeing. The way I understand and the way we have prepared  
20 the protocol, and the more recent one was designed to take some  
21 of your Honor's comments, the very first step is a pure random  
22 sample to get an understanding of how many relevant documents  
23 are likely in the corpus. Not which ones, just likely how  
24 many. That is where we used the 95 percent confidence level  
25 plus or minus 2 percent as the confidence interval, which I

1 understand is the industry standard. That is just an initial  
2 random sample to get a sense of what percentage of documents  
3 are likely relevant in the system.

4 Yes, we will use the coding of that as part of the  
5 ultimate training. But once we move beyond that random sample,  
6 the way we propose doing these seed sets --

7 THE COURT: Now I see what page you are both on. The  
8 difference seems to be 99 percent versus 95 percent.

9 MR. NEALE: Actually, if we limit it to this, I think  
10 Mr. Anders explained it exactly the way I did, and we have an  
11 agreement as to what constitutes the random sample for the  
12 initial random sample set.

13 THE COURT: That's the 2399.

14 MR. NEALE: Yes.

15 THE COURT: That's not what your lawyers wrote to me,  
16 but OK.

17 MR. NEALE: Actually in the conference we had we  
18 agreed to that number. And we in our letter indicate that we  
19 would, if other components of their process were changed, in  
20 taking it a step at a time, I'd say --

21 THE COURT: Good. Everybody agrees on the 2399,  
22 what's next?

23 MR. NEALE: However, your Honor, they have already  
24 conducted the review of those 2399 documents without taking  
25 into account the entire corpus of documents, which makes that

1 set not as random and not taking into account the two  
2 additional categories.

3 THE COURT: Despite my ESI expertise, you're going  
4 much too fast.

5 MR. NEALE: I'm sorry.

6 THE COURT: Dumb it down. You both agreed to use a  
7 2399 random sample.

8 MR. NEALE: Yes.

9 THE COURT: What did they do to that that you don't  
10 like?

11 MR. NEALE: They reviewed that sample set in advance  
12 of our discussion.

13 THE COURT: Advance what have?

14 MR. NEALE: Of us agreeing on that number and --

15 THE COURT: What's the difference?

16 MR. NEALE: -- and, importantly, the categories that  
17 would be reviewed for during the process.

18 THE COURT: By categories, you mean?

19 MR. NEALE: The seven subjective categories that are a  
20 critical component of training the system. We had just  
21 suggested, and I thought we had agreed, that those 2399 would  
22 be rereviewed to take into account all the categories so the  
23 system was properly trained at the first step.

24 THE COURT: It seems that your issue tags or whatever  
25 it is you're doing here -- I'm having a hard time figuring out

1 where you agree and where you disagree.

2 MR. ANDERS: Your Honor, I'll make it simpler if I  
3 can. On the random sample, we conducted the random sample when  
4 there were 2.9 million documents in the system. We were just  
5 trying to get started in doing some of the work. An additional  
6 400, 300,000 have since been added.

7 Plaintiffs' position is because you did that random  
8 sample before an additional 300,000 documents were added to the  
9 2.9 million, your random sample isn't valid. I understand, in  
10 consulting with our vendor, that adding that number of  
11 documents to that large database already doesn't really impact  
12 the validity of the sample.

13 The other difference is since we have done that  
14 sample, two issue codes were added, so that sample doesn't have  
15 those two issue codes. But that is more for the training of  
16 the system. Our position is when we do further training and  
17 incorporate those additional two concept groups, it will  
18 eventually catch up; it's not necessary to go back and do  
19 another random sample because we have added 300,000 documents  
20 to 2.9 million and because we have added two concept groups.

21 THE COURT: As to the 300,000 additional documents,  
22 would it help plaintiffs to take whatever the appropriate  
23 random sample is of the 300,000 and review that?

24 MR. BASKIN: If I may?

25 THE COURT: Or are they now so mixed in?

1 MR. BASKIN: It won't make a difference. The random  
2 sample is still going to be 2399. What happens is once the  
3 categories are reviewed of those 2399, you can retrain the  
4 system when the 300,000 additional documents are added, and the  
5 similar documents will indeed make it into those categories  
6 without a rereview.

7 THE COURT: That I understand.

8 MR. NEALE: That we don't disagree with. However, the  
9 system is only as good as the training that it gets.

10 THE COURT: I agree.

11 MR. NEALE: This issue of recoding documents will come  
12 up through our entire process here.

13 THE COURT: Let me ask you this. Other than however  
14 many of the 2399 get pulled for privilege, and since you both,  
15 as I recall your protocols, are taking a fairly transparent  
16 view, am I remembering correctly that plaintiffs' counsel are  
17 going to be allowed to review the 2399 that you have coded?

18 MR. ANDERS: Yes, your Honor.

19 MR. NEALE: We don't expect necessarily to have an  
20 issue with the way in which they were coded. We take issue  
21 with how they get applied and therefore iteratively trained and  
22 educate the system.

23 THE COURT: To the extent that two new subject matter  
24 codes or whatever, I take it -- I won't say "I take it,"  
25 because I'm not sure I take anything the way you are all

1 explaining it -- does that change the relevance? In other  
2 words, will it move a document from relevant to nonrelevant or,  
3 rather, probably the other way around, or will it just deal  
4 with the issue codes that you can separate what documents are  
5 relevant to out of the relevant group?

6 MR. NEALE: We believe that the two categories are new  
7 categories of relevance that would have not otherwise been  
8 captured during the initial review.

9 MR. ANDERS: Your Honor, how about this? Since we are  
10 going to provide those 2399 to them anyway, they are going to  
11 review them to make sure that we coded them relevant or not  
12 relevant correctly. If there are any that they think should go  
13 into those two new categories, they can tell us, and we'll make  
14 those designations in the system.

15 THE COURT: Does that work?

16 MR. NEALE: As it relates to this sample, it would.

17 THE COURT: Good. What's the next issue where you  
18 disagree?

19 MR. ANDERS: I think it would be the true creation now  
20 of the seed set. There is one area where we did all agree on  
21 that, and that was the judgmental sampling that we have done.  
22 Those documents have been coded and entered.

23 The remainder of how the seed set will be created is  
24 defendants had a list of key words. There were hits. We  
25 reviewed several thousand of those hits, encoded them. That's



1 attached I think as Exhibit B to the protocol. It shows the  
2 key words that we used and how we judgmentally sampled those  
3 and the number of documents we coded as being relevant.

4 THE COURT: Wait. I think it's your Exhibit C, not D.

5 MR. ANDERS: On the joint protocol I think it would be  
6 Exhibit B. Exhibit A is our key words. Exhibit B is a  
7 document we provided the plaintiffs which showed basically our  
8 analysis of our review of our key words.

9 THE COURT: Right. I'm sorry. Are you saying B as in  
10 "boy" is what I should be looking at?

11 MR. ANDERS: B as in "boy." Sorry.

12 THE COURT: OK.

13 MR. ANDERS: That is defendants' half of the training.  
14 What we would do is all the documents that we marked relevant  
15 here except for the privileged ones we would turn over to  
16 plaintiffs' counsel.

17 I think plaintiffs' issue on this is because we  
18 conducted this review prior to the inclusion of the two  
19 additional issue codes, all of these documents would not have  
20 been coded for those two new codes. I think we can address  
21 this the same way as we addressed the random sample. When we  
22 turn over these documents to plaintiffs, if during their review  
23 they believe that any of them fall within those two new codes,  
24 they can advise us.

25 THE COURT: Wait. On these email hits from Exhibit B,

1 are you giving them everything the key word hit or are you just  
2 giving them what you reduced from that? I'm not sure I  
3 followed you.

4 MR. ANDERS: Just from what we reduced. There were so  
5 many hits, we did not review every single hit. For example, if  
6 you look at the first page of Exhibit B, the initial term we  
7 used was "training."

8 THE COURT: Right.

9 MR. ANDERS: Going back to Exhibit A, the term  
10 "training" resulted in 165,000 hits. What we then did was we  
11 connected "training" with "Da Silva Moore," "Mayers." That  
12 second column shows all of the terms that we then did an "and"  
13 search essentially. We show next the document count, and we  
14 reviewed the top 50 ranked. What we reviewed were the top  
15 ranked.

16 THE COURT: All the ones you reviewed, whether you  
17 then coded them responsive or not, you're going to give them to  
18 review, other than privileged?

19 MR. ANDERS: Yes.

20 MR. NEALE: I think our only issue there is that  
21 what's being reviewed are those results of the search that was  
22 used to bring back those documents. Again, that search did not  
23 apply against at least 300 and now growing number of documents.

24 THE COURT: Once you get your seed set, that will pull  
25 in the 300,000 extra documents.

1 MR. NEALE: However, your seed set is determined based  
2 on a sample of the documents that you have reviewed.

3 THE COURT: Once you are out of random sample, you're  
4 just getting documents to train the system.

5 MR. ANDERS: Your Honor, importantly --

6 THE COURT: You're winning. You talk and you might  
7 lose.

8 MR. NEALE: However, your random sample is not  
9 reflective if it's not taken into account all of the documents.

10 THE COURT: Is there any reason to think that 300,000  
11 documents are different than the other 2.9 million?

12 MR. NEALE: I think there is, and I think the effort  
13 to rereview that number of documents does not outweigh the  
14 value of getting it right.

15 THE COURT: What number of documents?

16 MR. NEALE: Reapplying the search and rereviewing in  
17 the initial sample the 2399 which we have moved on from, but  
18 now this seed set, load the documents, research the documents,  
19 and do your search again. This is a critical component of the  
20 process.

21 THE COURT: How many documents? I'm looking at the  
22 first page, which already is several hundred, maybe a thousand  
23 documents. If you had to redo all of these --

24 MR. BASKIN: May I?

25 THE COURT: Yes, sir, please. I'm sorry. I need your

1 name again.

2 MR. BASKIN: David. David Baskin. B-A-S-K-I-N.

3 THE COURT: Mr. Baskin.

4 MR. BASKIN: Once you go through the random sample and  
5 you do any kind of seeding of a particular category, the  
6 training algorithm will actually return all of the relevant  
7 documents of the 300,000. You can do this over and over and it  
8 continues to iterate. Our system is a learning process. It  
9 goes over time and it will pull in those documents.

10 As compared to other systems that may be compared to  
11 ours, they have to do everything up front. There is no need to  
12 do everything up front. You can learn as you go within the  
13 Recommind Axcelerate system, and all the relevant documents  
14 will be pulled in over time through the various iterations.

15 THE COURT: Where do the extra 300,000 documents come  
16 from?

17 MR. ANDERS: They came from the email accounts of --

18 MS. BAINS: I believe they were new HR custodians, so  
19 they would be largely different.

20 THE COURT: Why would they be largely different?

21 MS. BAINS: Because they probably contain mostly  
22 complaints.

23 MR. ANDERS: Your Honor, let me go back. Plaintiffs  
24 also provided us with three different iterations of their key  
25 words. The last round of that was applied against the full

1 dataset, which includes those additional 300,000. We still  
2 have to review a portion of plaintiffs' key word hits which are  
3 based off of that larger database.

4 Our position is that half of the seed set creation  
5 which is the result of plaintiffs' key word hits is based off  
6 of the entire current database. So, we still are going to be  
7 reviewing a lot of documents in the creation of the seed set  
8 that is based off of the full database.

9 THE COURT: It doesn't sound to me like this needs to  
10 be redone in terms of percentages or other things. You're  
11 going to get the thousands of documents that the defendants'  
12 key word hits caused them to review. If you think that the  
13 things they coded as nonresponsive should be coded as  
14 responsive, you will do so, and they will run it accordingly.

15 MR. NEALE: Can I just add one comment to Mr.  
16 Baskin's?

17 THE COURT: Yes.

18 MR. NEALE: I think we agree that as long as the  
19 system has some exemplar documents to go, it will iteratively  
20 be trained. However, I think it is important to point out, and  
21 we'll get to it, that the defendants have from the beginning  
22 tried to limit significantly the number of documents that are  
23 subject to the iterative process. You can't have one and not  
24 the other.

25 THE COURT: No, I think what they have said is that

1 once the system is fully trained and run, at some point,  
2 undetermined and subject to court approval, they are going to  
3 say the likely relevance when you have reached X number is too  
4 small.

5 MR. NEALE: Actually, their initial protocol suggested  
6 that they would do two rounds of iterative review for training  
7 of 2399 each using the 95 percent confidence. There is nothing  
8 to say that after two rounds the system will be trained.

9 THE COURT: That's what you are all going to figure  
10 out.

11 MR. NEALE: The latest protocol suggests we'll add  
12 more rounds but we will significantly reduce the confidence  
13 level or the number of documents to 500. Now we will do 7  
14 rounds of 500 or 3500 documents to be relied upon in order  
15 to-determine relevance.

16 MR. BASKIN: No, that is completely wrong. There is  
17 no random sample or confidence anymore. The process that we  
18 have created in our algorithms returns as many documents as it  
19 finds. It finds it with a certain quality score. Then it  
20 ranks them by the highest score to the lowest score.

21 THE COURT: Is that zero to 100?

22 MR. BASKIN: It's 100 to zero. The top ones are the  
23 100 percent or close to it, and it goes down from there. I  
24 believe that is what defendants are looking to review, the 500  
25 top ones.

1 MR. NEALE: The patent submitted by Recommind I think  
2 is inconsistent with that. Despite that, taking that  
3 representation, you cannot at this point determine how many  
4 rounds of iterative review you can do to get the system right.

5 THE COURT: That is a different issue from what we are  
6 talking about now, although it may be the one you want me to  
7 get to next.

8 MR. NEALE: There is one issue related to the seed  
9 set. We have the defendants' search terms, which we have dealt  
10 with. We have the judgmental sample, which I think Mr. Anders  
11 mentioned first. Then we have the plaintiffs' search terms  
12 which would be applied against the entire document collection.

13 THE COURT: Right.

14 MR. NEALE: We suggest 5,000 documents be reviewed as  
15 a result of that search. I think defense suggests 3.

16 THE COURT: You know what King Solomon suggests.

17 MR. ANDERS: 4,000.

18 THE COURT: Is there any magic to any of these numbers  
19 other than everybody gets paid a lot more depending on how much  
20 work is done? 4,000. Solomon rules.

21 MR. ANDERS: Your Honor, that's fine.

22 Going back to defendants' seed set and what we are  
23 going to be turning over to plaintiffs, the only issue that we  
24 were discussing is the way we had reviewed our key word hits  
25 was, for example, the key word "training" yielded a few hundred

1 thousand hits.

2 THE COURT: Then you did training within --

3 MR. ANDERS: With "Da Silva Moore." The document  
4 count was 133 documents.

5 THE COURT: You reviewed 50.

6 MR. ANDERS: The top 50 ranked. We didn't find any  
7 relevant. The only issue I may foresee, because more documents  
8 were added to the system, is if we were to do that same search  
9 right now, I don't know if the top 50 would be the same top 50.  
10 We can certainly produce all of the relevant documents.

11 THE COURT: Wait. Are you telling me that you didn't  
12 save these results and that you have to rerun the system to get  
13 them and therefore there might be some slight differences?

14 MR. ANDERS: Yes, your Honor. I think as we were  
15 learning the system and when we were doing these initial  
16 reviews, I don't know if each specific search was saved as an  
17 individualized search.

18 THE COURT: It sounds like you have to run it again,  
19 which also solves the plaintiffs' problem, because then you're  
20 running against the full 300,000 added to the set. You will  
21 still review the same number. Whether you rereview them on  
22 your side or as long as you have screened for privilege, if you  
23 did 50 before, it may not be the same top 50, but you're going  
24 to give 50 to the plaintiffs, etc.

25 MR. ANDERS: What I would envision producing is not



1 necessarily these 50 went with this grouping. It would just be  
2 here are all of the relevant ones and all of the nonrelevant  
3 ones. I don't think it really matters how we got to it. What  
4 matters is how we coded it.

5 THE COURT: Any problem with that?

6 MR. NEALE: I wanted to clarify that that, to the  
7 extent it is being rerun now, also includes the custodians that  
8 were added today. That will round out the entire dataset.

9 THE COURT: Yes. Good. We have made progress.

10 MR. NEALE: All of the documents that are reviewed as  
11 a function of the seed set, whether are ultimately coded  
12 relevant or irrelevant, aside from privilege, will be turned  
13 over to us?

14 MR. ANDERS: Correct.

15 MR. NEALE: OK.

16 THE COURT: Good.

17 MR. ANDERS: Your Honor, if I may move on to the  
18 iterative rounds. I heard what Mr. Neale was saying, and I  
19 think there is one big source of disagreement. When we were  
20 here last time we had proposed doing two rounds and then, after  
21 that second round, reviewing the top 40,000. Your Honor said  
22 no, that wasn't sufficient. The way we revised the protocol  
23 was to include seven iterative rounds where at each round we  
24 review a minimum of 500 documents, not 500 total.

25 We discussed this with our vendor. Because this is

1 such a fluid process and we don't really know what is going to  
2 come back in that first round or that second round, it is tough  
3 to pinpoint an exact number. What we said in our protocol was  
4 we are going to use our best judgment along with the assistance  
5 of the project manager to review an appropriate number but at  
6 least 500 during each round.

7 We'll look at different concept groups. There may be  
8 certain rounds that have better sets. And we will stop either  
9 at the end of the seventh round or if, between two rounds, the  
10 number of new documents being brought back is less than 5  
11 percent. That was a number that we picked. There is no  
12 science to it. What we are trying to find is a point where the  
13 machine is not returning a large number of new documents.

14 But assume we get to the seventh round. I think  
15 plaintiffs' concern was we don't know if seven rounds is  
16 enough. What we have in our protocol is at the end of that  
17 seventh round we will do another random sample of the discards  
18 to compare against the first random sample. That will give us  
19 a sense of whether additional highly relevant documents are  
20 being left out in the discards.

21 THE COURT: When you say you are comparing the  
22 discards at that stage to the original discards, what do you  
23 mean by that?

24 MR. ANDERS: What I mean by that is at the very  
25 beginning of the process we did the random sample of 2399

1 documents, and a certain number of documents, I think 26 or 30  
2 of that, were found to be relevant. We now have a general  
3 baseline. After we go through the seven iterations, the system  
4 is going to be pulling out what it believes are the most  
5 relevant documents.

6 When that is done, we are going to have the documents  
7 the computer pulled and then everything else that's out there.  
8 We are going to do a random sample of everything else that is  
9 out there and see how many relevant documents are in that set.

10 The idea and the hope is it is going to be much less  
11 than what we found the first time. If it is, that is the  
12 assurance that the process worked. If it's not, and if it's  
13 the same number or higher or just one or two lower, we'll have  
14 to discuss. Maybe we will need to do another one or two  
15 iterations.

16 That is our proposal for how we do the iterations.

17 THE COURT: Mr. Neale.

18 MR. NEALE: I think we are stating that we don't at  
19 this point agree that this is going to work. This is new  
20 technology, and it has to be proven out. We are going to have  
21 insight into it and we are glad to see it proven out.

22 However --

23 THE COURT: Does Doar have its own computer-assisted  
24 review a/k/a predictive coding tool?

25 MR. NEALE: We advise clients on its use and its not

1 being used. But no.

2 THE COURT: I'm sorry. You advise clients on its use?

3 MR. NEALE: On the use of other predictive coding  
4 systems.

5 THE COURT: So you know if done right, in theory if  
6 not in practice, and I think in practice, it works?

7 MR. NEALE: Yes.

8 THE COURT: It certainly works better than most of the  
9 alternatives, if not all of the alternatives. So the idea is  
10 not to make this perfect, it's not going to be perfect. The  
11 idea is to make it significantly better than the alternative  
12 without nearly as much cost.

13 MR. NEALE: Right. I think it is fair to say we are  
14 big proponents of it. However --

15 THE COURT: Let me ask one more question. If my  
16 memory is right, your protocol is that at each of these rounds  
17 they are going to see the same documents you see, again except  
18 privilege?

19 MR. ANDERS: Yes.

20 THE COURT: It seems to me I'm accepting the protocol  
21 that you have suggested in that regard. But if you get to the  
22 seventh round and people are saying the computer is still doing  
23 weird things, it's not stabilized, etc., we need to do another  
24 round or two, either you will agree to that or you will both  
25 come in with the appropriate QC information and everything else

1 and do another round or two or five or 500 or whatever it takes  
2 to stabilize the system.

3 MR. NEALE: I just want to add in response that our  
4 concern about the approach overall, and Recommend in particular  
5 in this instance, is the complexity of the case and the data.  
6 Along with that is the fact that it is only going to serve up  
7 for review after your initial seed set what it determined at  
8 that point to be relevant.

9 THE COURT: Right.

10 MR. NEALE: Those 500-document iterative reviews or  
11 3500 documents plus or minus subject to review are not being  
12 randomly sampled and giving us a proper representation of  
13 whether it is getting the irrelevancy right. So it is a very  
14 limited verification for the training set of what's relevant.

15 THE COURT: In the end you're going to be sampling  
16 probably greater than 2399 because it may be both a statistical  
17 sample and what I will call comfort sample and you will see how  
18 much of that is coming out of the system is not relevant that  
19 should have been coded as relevant.

20 MR. NEALE: The proposal suggests 2399 of whatever the  
21 number of the irrelevant documents, I think in their estimation  
22 a few million, one round of 2399 to verify the irrelevancy,  
23 which we have had no insight into throughout the entire  
24 process.

25 THE COURT: You have had insight only in the sense

1 that you're seeing everything they are seeing in terms of  
2 training.

3 MR. NEALE: But we are only seeing what the system  
4 thought was relevant that they coded to be irrelevant, not to  
5 be what the system thought was irrelevant that should have been  
6 coded relevant.

7 THE COURT: Maybe the answer is that the seven  
8 iterative rounds of a minimum of 500 should not only be looking  
9 at the highest-response documents but should be looking at some  
10 other group of the low-response documents, whether that is 2399  
11 or, because we are doing lots of iterations, it's 500 or  
12 whatever you all think. That may make perfect sense. If it  
13 keeps turning up relevant documents, that's good. But if it's  
14 missing a lot of documents on each of those reviews, we need to  
15 figure that out sooner rather than later.

16 MR. ANDERS: Your Honor, one of my understandings is  
17 with each iterative round, the system will create, I think we  
18 have it set for up to 40 different concept groups where it just  
19 finds like documents. That was going to be part of the  
20 500-plus documents we review, picking different concept groups  
21 that seem to make sense.

22 THE COURT: What about the concept group that they say  
23 is totally irrelevant? That's probably not a group, but it's  
24 what I call the tail.

25 MR. ANDERS: I guess is the request that we would also

1 review a certain number of documents at the lower end of the  
2 spectrum?

3 THE COURT: Or the middle of the spectrum.

4 MR. NEALE: That's the suggestion. Our protocol  
5 suggests a random sample of everything.

6 THE COURT: How big a random sample?

7 MR. NEALE: At the 95 percent confidence level of  
8 2399.

9 THE COURT: That's 2399 each time?

10 MR. ANDERS: Yes.

11 MR. NEALE: Getting to the 500 document number --

12 MR. BASKIN: It's not, no.

13 MR. NEALE: -- our sense is that we will wind up doing  
14 several more rounds of iterative review at 500 than we would if  
15 we agreed to 2399, and that in the end we will get there faster  
16 and review less documents.

17 THE COURT: Does that make sense, Mr. Baskin? In  
18 other words, instead of 7 times 500, 5 times 1,000 or whatever  
19 the math is?

20 MR. BASKIN: I'm trying to make sure that both parties  
21 get what they want in the scenario. What happens in the  
22 proposal by the defendants is that they are providing the most  
23 relevant documents in their review.

24 THE COURT: Right.

25 MR. BASKIN: If you do a random sample within that

1 particular subset, it is not the 2399, because if the computer  
2 returns let's say 10,000 documents, 95 percent plus or minus 2  
3 is no longer 2399.

4 MR. NEALE: We are not talking about that's the  
5 difference. We are not limiting it to what you think is  
6 relevant. We want to randomly sample everything and the coding  
7 that was applied or not applied, so that we know whether your  
8 irrelevancy categorization is correct.

9 MR. BASKIN: That will happen at the end.

10 MR. NEALE: We don't think one random sample of  
11 3 million documents will give us enough.

12 MR. BASKIN: Judge, from what I understand, the  
13 request is not to do the random sample iterations, finish the  
14 iterations. I'm still not understanding.

15 THE COURT: What they are saying is each time you run  
16 it, whether it's 7 or less, and it may be two different things  
17 to satisfy yourself on the defense side and something else to  
18 satisfy the plaintiffs, but whether you do the 500 best  
19 documents or not, the 500 and possibly more, Mr. Neale was  
20 suggesting that on each iteration there is a random sample  
21 drawn and the computer will have coded some of those as  
22 relevant and some of them as not relevant; and if it is  
23 miscoding the documents that are not relevant, then there's a  
24 problem.

25 MR. BASKIN: Let me clarify. The computer doesn't



1 code documents. The computer suggests documents that are  
2 potentially relevant or similar.

3 THE COURT: Same thing.

4 MR. BASKIN: What happens is during the seven  
5 iterations, all the defense attorneys are going to do is refine  
6 the documents that they are looking at. After the seven  
7 iterations, what you are getting is a sum of it all. Then you  
8 are performing a random sample. Doing random samples in  
9 between makes no sense. The actual sum of the seven iterations  
10 will just be the sum of that. You are refining and learning.

11 THE COURT: What Mr. Neale is saying is that you might  
12 not have to do it seven times and that the sooner you find out  
13 how well the seed set or the training has worked, the better.

14 MR. BASKIN: What's going to happen, at least from  
15 what I understand the request to be, is that you do one  
16 iteration, which is 500, then you do 2399 samples, then you do  
17 another iteration, do another 2399. I think they are looking  
18 for the 7 times 2400 plus the 500 each. We are looking at  
19 21,000.

20 MR. NEALE: That's not what we are suggesting. We are  
21 actually suggesting that each iteration be one sample randomly  
22 selected of 2399, indicating which of those the system would  
23 have flagged as relevant so we know the difference in the way  
24 in which it is being categorized.

25 MR. ANDERS: I would think, too, we are now just

1 completely missing the power of the system. What we were going  
2 to review at each iteration are the different concept groups  
3 where the computer is taking not only documents it thinks are  
4 relevant but it has clustered them together and we can now  
5 focus on what is relevant to this case. By reverting back to a  
6 random sample after each iteration, we are losing out on all  
7 the ranking and all the other functionality of this system. It  
8 doesn't seem to make sense to me.

9 THE COURT: I'm not sure I understand the seven  
10 iterations. As I understand computer-assisted review, you want  
11 to train the system and stabilize it.

12 MR. BASKIN: If I may. What happens when you seed the  
13 particular category is you take documents, you review them.  
14 The relevant documents are now teaching the system that these  
15 are good documents.

16 THE COURT: Right.

17 MR. BASKIN: It also takes the irrelevant documents  
18 and says these are not good documents. It continues to add  
19 more relevant documents and less irrelevant documents into the  
20 iterations. The seven iterations will then refine that set and  
21 continue to add the responsive documents to each category.

22 At the end of that, after seven iterations, you will  
23 have not only positive responsive documents, also the  
24 nonresponsive documents, but the last set of computer-suggested  
25 documents the system suggests. From that point the defense is

1 saying we can then verify with a 95 percent plus or minus 2 of  
2 2399 to see if there is anything else that the system did not  
3 find.

4 THE COURT: Let me make sure I understand the  
5 iterations then. Is the idea that you are looking at different  
6 things in each iteration?

7 MR. BASKIN: Correct. It's learning from the input by  
8 the attorneys. That's the difference. That's why the random  
9 sample makes no sense.

10 MR. NEALE: I don't doubt that that is how Recommind  
11 proposes to do it. Other systems are, however, --

12 THE COURT: We are stuck with their black box.

13 MR. NEALE: -- fine to do it.

14 MR. BASKIN: It's not a black box. We actually show  
15 everything that we are doing.

16 THE COURT: I'm using "black box" in the legal tech  
17 way of talking. Let's try it this way, then we'll see where it  
18 goes. To the extent there is a difference between plaintiffs'  
19 expert and the defendants' on what to do -- and to the extent  
20 I'm coming down on your side now, on the defense side, that  
21 doesn't give you a free pass -- random sample or supplemented  
22 random sample, once you tell me and them the system is trained,  
23 it's in great shape, and there are not going to be very many  
24 documents, there will be some but there are not going to be  
25 many, coded as irrelevant that really are relevant, and

1 certainly there are not going to be any documents coded as  
2 irrelevant that are smoking guns or game changers, if it turns  
3 out that that is proved wrong, then you may at great expense  
4 have to redo everything and do it more like the way Mr. Neale  
5 wants to do it or whatever.

6 For the moment, since I think I understand the  
7 training process, and going random is not necessarily going to  
8 help at that stage, and since Mr. Neale and the lawyers for the  
9 plaintiffs are going to be involved with you at all of these  
10 stages, let's see how it develops.

11 MR. ANDERS: Your Honor, the last phase, just so we  
12 close this out, at the end of the seventh iteration our  
13 proposal calls for them to manually review all of the results  
14 with the caveat and the provision that depending on that  
15 number, we reserve the right to come to the Court for some  
16 level of relief, whether it's cost shifting, whether it's you  
17 stop at the top 30, 40, 50,000, whatever that number is. Also,  
18 by that point we will have the relevance rankings or  
19 percentages and we will have a sense of what is there.

20 THE COURT: As I said before, I'm not prepared to rule  
21 on where you stop until I see those relevance rankings. Any  
22 issue on that, Mr. Neale?

23 MR. NEALE: Again, the biggest concern that I will  
24 convey to my clients here is that we are not going to have  
25 proper insight into how the system is determining irrelevancy.

1 We are not going to see representative samples of those  
2 documents.

3 THE COURT: You're going to see the training.  
4 Frankly, since you're going to see all the documents used to  
5 train the system, it's not like the system is then black box or  
6 not -- Mr. Baskin doesn't like me referring to it as a black  
7 box -- you're going to know how the system was trained to find  
8 relevance.

9 MR. NEALE: Right. But we are only going to see as a  
10 result what is relevant. We are not going to see how it  
11 actually interpreted it to the result set. We are only going  
12 to see coming out of the seed set things that are relevant.

13 THE COURT: That's always how it's going to be.

14 MR. NEALE: Maybe in their system, but not in other  
15 systems.

16 THE COURT: In other computer-assisted review systems?

17 MR. NEALE: They are simultaneous random samples that  
18 compare machine-generated review to human review, compare the  
19 two, reach a level, and tell you you're there. This is we are  
20 going to tell you what is relevant, as long as you confirm it,  
21 we're good, we're done.

22 THE COURT: I thought seven iterations is doing  
23 exactly what you are saying.

24 MR. BASKIN: That is correct. It's human review.

25 MR. NEALE: I think it is actually worse because it's

1 only giving you what it first determined to be relevant, having  
2 you verify or not those calls, and then using that to determine  
3 better what's relevant, not against how you have miscoded for  
4 irrelevancy. So, if I think 500 documents as a sample is too  
5 small, 7 is certainly too much of a limit. I question why the  
6 original protocol suggested 2399 and was valid and this  
7 protocol suggests 500.

8 THE COURT: How many times?

9 MR. NEALE: 2.

10 THE COURT: Will 2 times through at 2399 work, and  
11 then you do whatever else you want to do after that in terms of  
12 irrelevance as opposed to relevance?

13 MR. BASKIN: The system could return 300 documents in  
14 the first iteration. At that point you can't do 2399. I'm  
15 actually impartial. I designed the system. I work for the  
16 company, and I'm not getting paid for this. I just wanted to  
17 let you know that 7 iterations from a quality perspective is  
18 better to the plaintiff.

19 MR. NEALE: It is also inconsistent with your patent,  
20 which suggests that you do the iterations until the system  
21 tells you it's got it right. Speaking to the limit on that  
22 without having done it is not consistent with your own patent  
23 and with what is generally accepted as best practice.

24 THE COURT: They also claim to have a patent on the  
25 word "predictive coding" or a trademark or a copyright. We

1 know where that went in the industry. But I'm just tweaking  
2 you.

3 MR. BASKIN: No problem. The predictive patent coding  
4 does indeed go through that. However, when you have a certain  
5 number of iterations and you have a final review of all  
6 computer-suggested documents and you are confined to 7  
7 iterations as well as having the plaintiffs review those  
8 documents and seeing yourself what's happening, then you can  
9 judge for yourself whether or not the defendants are making the  
10 right decisions on these documents. If you agree on those  
11 decisions, then you will agree on the actual response of the  
12 computer-suggested returns from the training sets. If you  
13 don't agree on those, then you might have a different opinion.

14 THE COURT: Let's see how it works.

15 MR. NEALE: The other thing on the second part of  
16 that, which is where the cliff comes in, I don't think counsel  
17 truly understands what the expectations of the process should  
18 be, assuming it works. Again, the patent itself suggests that  
19 as a result of this process you should be reviewing 10 to 35  
20 percent of your total document collection, which is supposed to  
21 indicate a significant savings, which in this case would be  
22 about 300 to 1 million documents. They keep talking about  
23 40,000 to 75 as being burdensome and disproportional. If they  
24 don't understand the result of the system, what to expect, I  
25 don't understand why they are proposing it in the first place.

1 MR. ANDERS: Your Honor, one of the reasons why we  
2 developed this work flow was, again, this is not a case where  
3 we are prepared to review a million documents during this first  
4 phase. We worked with our vendor and came up with a modified  
5 work flow that we believe is defensible but is also reviewing a  
6 more reasonable number of documents for this case.

7 THE COURT: We'll see. Make sure you're keeping track  
8 of your costs in ways that you will be able on both sides to  
9 present to the Court not for reimbursement but for  
10 proportionality as to where you draw the line. I'm not saying  
11 that there is a dollar number that I'm going to cut it off at  
12 or a percentage or where the cliff is. We are going to figure  
13 all that out.

14 All of this, obviously at some expense, can be  
15 revisited if things are not working well. I also remind both  
16 sides that by the time you get to trial, even with six  
17 plaintiffs, if you have more than 100 trial exhibits it will be  
18 a miracle. The idea is I think people should focus less on do  
19 I have every last document that says the same thing or do I  
20 have the big hot docs that are going to prove my case, I know  
21 the response from the bench on that is, sure, if they can  
22 assure me they will give me the 100 hot docs that I'm going to  
23 use as my trial exhibits, I'll quit right there. It doesn't  
24 quite work that way. Let's not overkill the system.

25 Is there anything else we are supposed to be doing or



1 resolving or have we now got the protocol locked?

2 MS. BAINS: Your Honor, on the 500 documents, I'd just  
3 ask that it is at least raised to the number that was  
4 originally suggested, which was the 2399 times 2. That gets  
5 you more documents than they are proposing in the 3500. Can we  
6 raise the 500 document number?

7 THE COURT: The difference is 500 relevant versus 2399  
8 of which probably 2200 are going to be not relevant. Mr.  
9 Neale, do you agree? Let me not ask it that way. Do you have  
10 any suggestion?

11 MR. NEALE: If we are going to apply their suggestion,  
12 I believe that 7 rounds of 500 as an indicator as to whether it  
13 is working is better than 2 rounds of 2399.

14 JUROR NO. 94: It is at least 500, maybe more,  
15 depending on what we see.

16 THE COURT: OK.

17 MR. ANDERS: The last thing I want to mention, your  
18 Honor, and it is nothing we need to decide, but we have a  
19 clawback provision in the current confidentiality agreement. I  
20 will likely be submitting a more detailed clawback provision  
21 for counsel's consideration.

22 THE COURT: Detailed? Are we talking 502(d) or  
23 something else?

24 MR. ANDERS: 502(e), I believe. Well, we will ask  
25 your Honor to so order it.

1 THE COURT: You can do one that says if you do the  
2 following 52 steps, then we should be covered under 502(d).  
3 That's great, but when step 49 got screwed up somewhere, you've  
4 lost your protection. It seems to me that 502(d) can say that  
5 unless you intended to waive the privilege, whether you were  
6 sloppy or careful, you retain the privilege and you get the  
7 clawback. I'm happy to sign an order that says exactly that.  
8 If you all want to do it a different way --

9 What I dislike and what I usually refuse to sign are  
10 orders that purport to be 502(d) orders that really do nothing  
11 better than repeat the language of 502(b), as in "boy," which  
12 is already a federal rule in place.

13 MR. ANDERS: Let me review the language in our  
14 confidentiality agreement. I just want to make sure that the  
15 language we have in place is sufficient to cover us.

16 THE COURT: Did I sign the confidentiality agreement?

17 MR. ANDERS: I don't believe so. I don't believe it  
18 was you, your Honor.

19 THE COURT: Then it probably isn't right. I'm happy  
20 to give you the plain vanilla protected against anything except  
21 an intentional waiver 502(d) order. That is almost all it has  
22 to say. Write it up as a separate the document and submit it  
23 to me, preferably by consent. I can't imagine why there would  
24 be any objection.

25 MR. ANDERS: Thank you, your Honor.

1 THE COURT: Now are we done with the protocol?

2 MS. BAINS: I guess the last thing is defense doesn't  
3 want to put anything in the protocol about its preservation  
4 obligations.

5 THE COURT: That's what that got to do with the  
6 protocol as opposed to the Zubulake Compensation Committee?

7 MS. BAINS: It's in a lot of the model protocols.  
8 There are extensive sections on it.

9 THE COURT: What is it you want it to say? Is that in  
10 the draft in front of me in any way?

11 MS. BAINS: Yes. Just a couple of sentences here and  
12 there. I didn't understand what the problem was.

13 THE COURT: Give me the page.

14 MR. ANDERS: It essentially says that we agree to  
15 preserve everything in their section C. My concern, your  
16 Honor, is we understand our obligation, we have an obligation  
17 to preserve. I don't see why we need to sign another  
18 agreement, especially when their proposal had longer time  
19 frames than we had agreed to, has different sources that we had  
20 disagreement over. We have an obligation to preserve. We have  
21 sent out the preservation notices at least three separate  
22 times. I don't see why I need to sign another agreement now on  
23 the preservation issue.

24 MS. BAINS: Because of the phasing.

25 THE COURT: What paragraph? What page, what

1 paragraph?

2 MR. ANDERS: It appears in a few different places,  
3 your Honor. The first time it appears is --

4 MS. BAINS: (b), page 2.

5 THE COURT: That's near the beginning.

6 MR. ANDERS: At page 2, (b)(1).

7 THE COURT: I don't see that this does anything.  
8 Indeed, if you do it your way and then don't hold something  
9 from a source other than a source in paragraph C, you've given  
10 them a free ride on something that is otherwise required to be  
11 held under Zubulake Pension Committee and the like.

12 In addition, since so far you have not been able to  
13 prove to me that a lot of the systems that we killed have  
14 anything to do with this case. I don't want to hear it today  
15 at 2 to 6:00, but if someone came to me and said, I want a  
16 preservation order, Judge, that says I do not need to preserve  
17 anything in source XYZ, etc., I might well agree to that.

18 MS. BAINS: OK. Lastly, the issue tags. Plaintiffs  
19 have inserted definitions of what the issue tag would mean so  
20 that the system is accurate, the reviewers are looking for the  
21 right things. We think we should have some language in there  
22 for what each issue tag means rather than just two words.

23 THE COURT: First of all, I assume, with the number of  
24 documents we are talking about for the seed set, that the  
25 review is going to be done by high-level attorneys.

1 MR. ANDERS: Yes.

2 THE COURT: If you all want to try to write something,  
3 that's fine. I'm not sure what page on that you want me to  
4 look at, or what attachment.

5 MS. BAINS: It's on page 24. Given that a high-level  
6 attorney is going to be reviewing and will see the documents,  
7 if it becomes an issue, we'll deal with it later.

8 THE COURT: OK. This may be for the benefit of the  
9 greater bar, but I may wind up issuing an opinion on some of  
10 what we did today. It would be very helpful to now finalize  
11 the protocol, without prejudice to anyone's rights to go to  
12 Judge Carter, finalize the protocol based on everything that  
13 was agreed or directed today and submit that back to me  
14 quickly.

15 How soon can I get that? That I assume will mean  
16 largely taking out the argument parts of the protocol of  
17 plaintiff wants this and defendant wants that and merely show  
18 what's in phase 1, what's in later phases or not in a phase,  
19 the five rounds, the seven rounds, etc.

20 MR. ANDERS: Can we do it by next Friday?

21 THE COURT: Sooner if you can.

22 MR. ANDERS: Certainly.

23 MS. BAINS: As in next week, Friday?

24 THE COURT: I'd rather have it a week from today,  
25 which is next Wednesday. Where does Lincoln come in? You

1 probably work through Lincoln.

2 MR. ANDERS: That's probably the 20th.

3 THE COURT: Presidents Day is the 20th. Lincoln's  
4 birthday is going to be either the 13th or the 14th. Thursday  
5 the 16th, does that work for all of you?

6 MR. ANDERS: Yes, your Honor.

7 MS. BAINS: Sure. Can we set an intermediate deadline  
8 to have a draft from one party to the other? It became a  
9 problem last time because we didn't have enough time to review  
10 it.

11 THE COURT: Sure. Who is drafting it?

12 MR. ANDERS: I'll draft it, your Honor.

13 THE COURT: Can you get them a draft by Monday?

14 MR. ANDERS: Yes, your Honor.

15 THE COURT: Good.

16 MS. BAINS: Thank you.

17 THE COURT: With all due respect to both of you, if I  
18 have to start doing Mickey Mouse of who does a draft to whom  
19 when on something somewhere between what's already on paper so  
20 all you have to do is delete all the arguments and the things  
21 that one side or the other lost -- it should be a no-brainer.  
22 You will have the transcript. Really, if you all can't do  
23 this, you're going to encourage me greatly to give you a  
24 special master and run your bills up instead of me dealing with  
25 all of you.

1 MR. BRECHER: Judge, I have one quick issue, if I can,  
2 before we end.

3 THE COURT: Yes. We are also going to have to pick a  
4 date for your next visit here.

5 MR. BRECHER: The plaintiffs served a third-party  
6 subpoena yesterday on ADP. I'm just asking, in light of the  
7 Court's ruling today, whether that subpoena was going to be  
8 withdrawn so that we can avoid further motion practice.

9 MS. BAINS: Yes, if we get the W-2's from the  
10 defendant, we can withdraw that.

11 MR. BRECHER: Thank you.

12 THE COURT: Withdraw it now, period, without prejudice  
13 if the W-2 issue somehow doesn't work.

14 MS. BAINS: Sure.

15 MR. BRECHER: Thank you, your Honor.

16 THE COURT: When do you all want to come back?

17 MS. NURHUSSEIN: Your Honor, if I could address one  
18 more issue very quickly? I need about 30 seconds.

19 THE COURT: Sure. I have to remember to start giving  
20 you six-hour conference blocks.

21 MS. NURHUSSEIN: I just want to note, your Honor, that  
22 since the last conference we have been conferring with the  
23 defendants regarding the jurisdictional discovery requests. We  
24 have had meet-and-confers with the defendants, some follow-up  
25 correspondence regarding some of the outstanding discovery. We

1 received a response from Publicis yesterday which we are  
2 reviewing.

3 I discussed with Mr. Evans, counsel for Publicis just  
4 before this conference. What we proposed is that the parties  
5 confer again this week and then submit to the Court a proposed  
6 schedule on jurisdictional discovery. We are trying to narrow  
7 the discovery disputes and reach agreement on any additional  
8 time that we need.

9 THE COURT: Good.

10 MS. NURHUSSEIN: Thank you, your Honor.

11 THE COURT: I guess the other thing is since there is  
12 going to be lots of cooperation and iteration, what sort of  
13 deadline do you want me to impose on everything you're all  
14 doing collectively to make the predictive coding end up? Or  
15 should I leave you to your own devices?

16 MR. ANDERS: Your Honor, it's tough for me to estimate  
17 how long it's going to take. We are going to start on it right  
18 away, obviously. It's just tough to give a time estimate right  
19 now.

20 THE COURT: That means we will probably get you in for  
21 conferences sooner rather than later to make sure things are  
22 moving along. With that, when do you all want to come back?

23 MS. BAINS: The first week of March.

24 MR. ANDERS: The 5th and the 7th are good for me, your  
25 Honor.



1 THE COURT: The amount of time you all need, are you  
2 free on the 8th in the morning?

3 MR. ANDERS: I have a deposition that day, your Honor.

4 THE COURT: What about the 9th?

5 MR. ANDERS: That looks good, your Honor.

6 MS. BAINS: That's fine.

7 THE COURT: I'm going to give you a date of March 9 at  
8 9:30. I may have to move that date to earlier in that week.  
9 I'm supposed to be talking at an e-discovery conference or a  
10 conference with an e-discovery session on the 9th, but I'm  
11 trying to bail out of that because I just don't have time for  
12 it. It depends on whether they can get someone to replace me,  
13 since I said I was going to do it. Right now I'm assuming that  
14 I'm replaceable. If that changes, we'll let you know.

15 For the last time perhaps but so it's on the record  
16 again, pursuant to 28 U.S.C. Code section 636, Federal Rules 6  
17 and 72, any party aggrieved by any of my rulings has 14 days,  
18 calendar days, to bring objections to Judge Carter. Failure to  
19 file objections constitutes a waiver for all purposes.  
20 Obviously, not a waiver on anything that I said is a phase 1  
21 versus phase 2, other than if you want it in phase 1. In other  
22 words, anything that I said you may get later but you are not  
23 getting now is probably not ripe for review. But you'll figure  
24 that out and objections filed with Judge Carter will figure  
25 that out.

1 Failure to file objections within the 14 day period  
2 constitutes a waiver for all purposes, including appeal. The  
3 14 days starts immediately regardless of how soon you get the  
4 transcript because you have heard the rulings. In any event,  
5 because I think you're all going to need the transcript and I'm  
6 certainly going to need the transcript because of all the  
7 protocol-related decisions made on it, I'm going to direct both  
8 sides to split the cost 50-50 for an expedited transcript.  
9 That means, since we have kept Tom late, as soon as he can get  
10 it, which is probably Friday, maybe, Monday at the latest.

11 I think that's it. Is there something I forgot to do?  
12 I don't think so.

13 (Adjourned)  
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